Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, and WYOMING,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and CHEVRON U.S.A. INC.,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, where the assignment of jurisdiction to the Federal Circuit is "issue jurisdiction," that court has exclusive jurisdiction over an appeal to the Tenth Circuit in which the original claims in the district court related to a statute assigned to the Federal Circuit, but the appeal challenges the district court's interpretation of a statute not assigned to the Federal Circuit.

2. Whether, if the Federal Circuit and the Tenth Circuit are deemed to have concurrent jurisdiction over an appeal filed in the Tenth Circuit, the Tenth Circuit may abstain from the exercise of jurisdiction where there is no possibility of duplicative proceedings because no new appeal can be filed in the Federal Circuit, and the Federal Circuit cannot provide an adequate alternative forum because the Tenth Circuit intends not to transfer the case.

3. Whether, in a case potentially involving hundreds of millions of dollars of restitution for the energy programs of all states, the federal treasury and oil consumers, the "interest of justice" standard in the Transfer Statute, 28 U.S.C. § 1631, can be applied to exclude appellant states from all appellate forums because they declined to proceed on the merits in two courts simultaneously.

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PETITION FOR WRIT OF CERTIORARI

The States of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin, and Wyoming, through their respective Attorneys General, respectfully petition for a writ of certiorari to review the Order and Opinion of the United States Court of Appeals for the Tenth Circuit entered in that court's docket Nos. 99-3065 and 99-3066 on March 6, 2000.

OPINIONS BELOW

The order of the court of appeals denying appellants' petition for rehearing, attaching an amended opinion dismissing the appeals and denying the motions for transfer, is reproduced in Appendix A, and is reported at 206 F.3d 1345 (10th Cir. 2000). The initial Order and Judgment of the court of appeals, later amended, dismissing the appeals, is set forth in Appendix B, and is not reported. The unreported Memorandum and Order of the District Court for the District of Kansas in MDL 378 is set forth in Appendix C.

JURISDICTION

The Order of the court of appeals, denying Petitioners' timely petition for rehearing, and amending and reissuing its original Order and Judgment, was entered on March 6, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The texts of 28 U.S.C. § 1291 (Final Decisions of District Courts), 28 U.S.C. § 1295(a)(11) & (12) (Jurisdiction of the United States Court of Appeals for the Federal Circuit), and 28 U.S.C. § 1631 (Transfer to Cure Want of Jurisdiction) are set out in Appendix D.

STATEMENT OF THE CASE

This case involves the effort of fourteen states ("the States") to enforce a 1986 Final Settlement Agreement ("FSA") among all the states, the federal government (through the Department of Energy ("DOE")), virtually the entire oil industry, including

respondent Chevron U.S.A., Inc. ("Chevron"), and thousands of other parties. If left undisturbed, the Tenth Circuit's action here would deprive the States of any forum to hear the appeal of their claim that DOE violated that Agreement in an enforcement proceeding now valued at over six hundred million dollars, which, in accordance with the FSA, would, if recovered, be disbursed to benefit the energy-consuming public of this nation.

A. The "Stripper Well" Final Settlement Agreement

The FSA was "a settlement agreement of historic proportions" resolving "monumental multidistrict litigation." In re Department of Energy Stripper Well Exemption Litigation, MDL 378, 653 F. Supp. 108, 109 (D. Kan. 1986)("MDL 378").[1] The FSA determined the distribution of over one billion dollars of oil overcharges in the district court's escrow. *Id.* It also resolved two other major matters: the distribution of crude oil overcharges recovered by DOE in future enforcement cases and separate litigation involving DOE's "Entitlements Program."[2] The Agreement was made subject to "the Court's continuing equity power to insure compliance," *id.* at 121, which the Kansas district court has exercised in numerous later proceedings.[3]

Under the FSA, 40% of all crude oil refunds collected by DOE is allocated among all of the states and territories as indirect

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[1] Relevant portions of the FSA are reprinted in the Appellate Appendix in No. 99-3065 (hereinafter "99-3065 App") 148-161.

[2] *Id.* at 109, 112, 117. The court concluded that the Agreement would "inure to the public good" in part because "groups and entities specifically designated to represent the public interest -- such as the Department of Energy and the fifty States' attorneys general -- have participated extensively in these proceedings and have subjected the settlement agreement to the closest scrutiny." *Id.* at 119, 118.

[3] *See*, In re Department of Energy Stripper Well Exemption Litigation, 880 F. Supp. 1466, 1471 (D. Kan. 1995) ("Since the entry of the FSA, the court has issued numerous opinions adjudicating disputes among various signatories to the FSA regarding the interpretation of the FSA.").

restitution for use in energy-related programs to benefit their oil-consuming citizens.[4] Since 1986, the states have received approximately two billion dollars under the FSA.[5] The FSA also allocates 40% of the funds received to the United States Treasury as indirect restitution to the public at large, and the remaining 20% is set aside for a claims process for individuals who did not become parties to the FSA and who assert injury from the violations at issue. *Id.* at 113. All Parties to the FSA -- except the States and DOE -- waived any further claims to crude oil refunds. *Id.* at 114. All of the refiner Parties, such as Chevron, also settled all of their claims under the Entitlements Program, signing waivers in "full accord and satisfaction" of any claims based upon that program, and particularly and explicitly arising from termination of that program. 99-3065 App 155, 157.

B. DOE's Enforcement Proceeding Against Chevron

This case began with a Proposed Remedial Order ("PRO") brought in 1992 by DOE's prosecutorial arm, the Economic Regulatory Administration ("ERA"), against Chevron. ERA charged that Chevron had violated continuing obligations it had incurred under DOE's prior crude oil price controls. The PRO sought restitution in an amount which with interest now exceeds $600 million.[6]

The statutory authority for remedial order proceedings at DOE is Section 503 of the 1977 Department of Energy Organization Act ("DOE Act"), 42 U.S.C. § 7193. Pursuant to Delegation Orders from the Secretary of Energy implementing the DOE Act, DOE's Office of Hearings and Appeals ("OHA") has for over 20 years

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[4] 653 F. Supp. at 113; 99-3065 App. 152-53. The States which are petitioners here are entitled to 28.8% of the amount due to all of the states, pursuant to the FSA. *See*, 653 F. Supp. at 113.

[5] *See* 653 F. Supp. at 12 (DOE estimated total crude oil overcharge funds distributed under the Agreement would be $4-5 billion.)

[6] App A-5-6.

conducted "adjudicatory" proceedings in which oil companies can contest PRO's on factual and legal grounds.[7]

Here, Chevron availed itself of the opportunity to have the case "adjudicated in an administrative proceeding before the OHA."[8] The States, because of their substantial financial interest, became parties. 99-3065 App 52, n.10. OHA conducted a lengthy adversarial proceeding, including extensive discovery, testimony, cross-examination, briefing and oral argument, in which the States participated actively. *Id.* at 51-55. Chevron's principal defense in the proceeding was that, because of the termination of DOE's Entitlements Program, it was prevented from receiving the regulatory benefit it had anticipated. *See*, App C-7; 99-3065 App 53. ERA and the States replied that in the FSA, Chevron had explicitly waived any claims, including offsets to other liabilities, based on the termination of the Entitlements Program, and that DOE had likewise promised not to grant any further benefits based on entitlements. *See* App C-3; 99-3065 App 80-81. ERA characterized Chevron's assertion of this defense as "unconscionable" in light of its FSA waivers. 99-3065 App 16.

On March 25, 1996, OHA issued a "Decision and Order"[9] dismissing the enforcement action, based upon its acceptance of Chevron's entitlements defense. *See*, App C-8; 99-3065 App 53, 60-61, 69-70. OHA stated repeatedly that it was making "legal" rulings, *e.g.*, *id.* at 76, 82, and did not claim to be exercising prosecutorial discretion or departing in any way from its customary adjudicatory role.

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[7] *See* Atlantic Richfield Co. v. DOE, 769 F.2d 771 (D.C. Cir. 1984) ("ARCO"); Delegation Order No. 0204-24 at § 9, 99-3065 App 185. DOE delegated to ERA its prosecutorial powers and discretion, including the "formulation and establishment of enforcement policy," DOE Delegation Order 0204-126 at § (a)(11), 99-3065 App 179, and the authority to initiate (§ (a)(3)) and to settle (§ (a)(7)) enforcement cases. 99-3065 App 178, 179.

[8] As DOE described it to the district court. 99-3065 App 118-19.

[9] The OHA decision is reprinted in full at 99-3065 App 44-85.

C. The States' Court Challenges to OHA's Decision

On May 24, 1996, the States filed in U.S. District Court in Kansas a "Motion to Enforce the Final Settlement Agreement" in the existing MDL 378 docket, asserting that OHA's action, dismissing the PRO on the basis of Chevron's entitlements defense, violated the FSA as approved by that court, as well as other statutory and regulatory provisions. At the same time, anticipating objections to the court's considering all of the States' claims in the MDL 378 docket, the States also filed a separate complaint, No. 96-1180, which asserted the same claims as those in the Motion to Enforce. The two matters were consolidated for hearing. The district court had jurisdiction of the MDL 378 action pursuant to 28 U.S.C.§§ 1331 and 1361, and also under the jurisdictional provisions of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 754(a)(1), and the DOE Act, § 502(a), 42 U.S.C. § 7192(a). The District Court's jurisdiction in No. 96-1180 was invoked under those same statutory provisions and under sections 210(a) and 211(b) of the Economic Stabilization Act ("ESA"), formerly 12 U.S.C. § 1904 note.

D. The District Court's Decisions

On January 21, 1999, the district court issued a decision in each docket. In MDL 378 the court addressed only the States' claims of violation of the FSA. It held that "OHA's dismissal of the remedial order against Chevron was a part of DOE's prosecutorial function and as such, was unreviewable." App C-12. In its decision in the separate docket, the District Court adopted the MDL 378 decision dismissing the FSA claim, and dismissed the States' claims *not* based on the FSA for lack of standing, and alternatively, for improper venue.

The district court's dispositive ruling that OHA's decision was unreviewable prosecutorial discretion relied solely and entirely on upon a particular passage on page 1481 of Consolidated Edison v. O'Leary, 131 F.3d 1475 (Fed. Cir. 1997) ("Con Ed"). That case involved a challenge to the same OHA decision involved here, but

by private plaintiffs who were not parties to the FSA and who thus could not and did not raise any alleged violations of that Agreement. In affirming the dismissal of their complaint for lack of standing, the Federal Circuit, based on the legislative history and terms of Section 503 of the DOE Act, 42 U.S.C. § 7193, had concluded that:

> the exercise of enforcement discretion ends, and the adjudication of the alleged violation begins, after the Office of Hearings and Appeals issues the Department's remedial order, not after the Economic Regulatory Administration issues its proposed remedial order. . . . [T]he task of reviewing the remedial order was committed to the Federal Energy Regulatory Commission . . . . Congress [in the DOE Act] contemplated that those procedures leading up to the issuance of the remedial order would all be part of the "prosecutorial" function of the Secretary of Energy. [131 F.3d at 1481.]

This passage was cited and quoted from by the district court here as the basis of its unreviewability ruling. App C-12.

Despite its conclusion that it was statutorily barred from reviewing the challenged OHA decision, the district court nevertheless proceeded to address the States' claims and DOE's and Chevron's defenses on the merits. It rejected the claims and accepted the defenses based upon its analysis of the OHA decision and of certain provisions of the FSA, including Section IV(a)(2), which stated that the Agreement did not "limit or render reviewable the exercise of DOE's prosecutorial discretion . . . with regard to any enforcement matter."[10]

E. The States' Appeals

The States timely appealed both district court decisions to the Tenth Circuit. The States also filed "protective" notices of appeal

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[10] FSA IV.A.2, 99-3065 App 154, quoted in the district court opinion at App C-12-13.

to the Federal Circuit. The States then moved to stay the protective appeals pending final dispositive action by the Tenth Circuit, stating that they had no Federal Circuit issues to raise unless and until Tenth Circuit action left issues to be determined by the Federal Circuit, and that a stay while the main action proceeded was the routine practice with regard to protective appeals in the price control field.[11] DOE and Chevron opposed the stay motions.

In the Tenth Circuit, DOE and Chevron moved for summary dismissal, claiming that exclusive jurisdiction lay in the Federal Circuit. The States responded that under the "issue jurisdiction" which the Federal Circuit had inherited from the Temporary Emergency Court of Appeals ("TECA"), App A-8, it was the issues actually raised on appeal, and not the issues involved in the proceeding below, which determined appellate jurisdiction. The States explained that the primary issue in their appeal was the district court's ruling, based on the DOE Act, that OHA's decision was not adjudicatory, but was an exercise of prosecutorial discretion, and thus wholly unreviewable. Since the DOE Act is undisputedly *not* among the statutes assigned to the Federal Circuit, the States argued, the appeal was clearly within the jurisdiction of the Tenth Circuit.

On June 30, 1999, after briefing on the jurisdictional motions, the Tenth Circuit "reserve[d] judgment" on the motions to dismiss, referred the jurisdictional issue to the merits panel, set the due date for the States' merits briefs as August 9, 1999, and stated its intention to hear oral argument on the appeals in November 1999. Subsequently, on July 22, 1999, a Federal Circuit panel issued a

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[11] "Protective appeals" in this field have a long history recognized by the courts of appeals. *See, e.g.*, Coastal States Marketing v. New England Petroleum Corp., 604 F.2d 179, 186 n.9 (2d Cir. 1979); RJG Cab, Inc. v. Hodel, 797 F.2d 111, 117 (3rd Cir. 1986). This practice has continued since the Federal Circuit was assigned this jurisdiction. *See, e.g.*, Phoenix Petroleum Corp. v. Federal Energy Regulatory Commission, 95 F.3d 1555, 1558-59 (Fed. Cir. 1996). Protective appeals are routinely stayed pending completion of the primary appeal. *E.g.*, Coastal States, 604 F.2d at 186 n.9.

non-precedential order, without explanation, denying the States' motions to stay the protective appeals, and setting the due date for the States' initial briefs as August 12, 1999, three days after the due date for their merits briefs in the Tenth Circuit.

F. Dismissal of the Protective Appeals in the Federal Circuit

On August 11, 1999, prior to the due date for their briefs and prior to any designation of issues, briefing, or rulings on any merits or jurisdictional issues in the Federal Circuit, the States, in order to avoid having both sets of appeals go forward on the merits simultaneously, moved for voluntarily dismissal of their protective appeals in the Federal Circuit. DOE and Chevron opposed this motion, and Chevron also separately moved to dismiss the Federal Circuit appeals with prejudice due to failure to file briefs.

The Federal Circuit issued a non-precedential order ruling on the States' and Chevron's motions on August 31, 1999. Paragraph (1) of the ordering language stated that "absent objection by Alabama within 10 days," the court would "grant Alabama's motion to withdraw its appeals and dismiss them with prejudice." The Federal Circuit also *denied* "Chevron's motion to dismiss ... due to Alabama's failure to file briefs."[12] In its introductory language prior to the ordering paragraphs, the Federal Circuit's non-precedential order commented that:

> [a]s Chevron and DOE point out, if a dismissal is entered without prejudice, Alabama could, in the event of an adverse ruling by the 10th Circuit, seek to resurrect its appeal here by way of transfer. That would be an impermissible result, given our prior rulings[13] and the fact

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[12] Pursuant to Fed. Cir. Rule 31(c), the States' motion to voluntarily withdraw their appeals suspended the time for filing the briefs, and thus the States' briefs had not become due at the time of the dismissal of the appeals.

[13] The only "prior rulings" by the Federal Circuit were unexplained non-precedential orders relating to the States' stay and extension motions.

that appeal no. 99-1327 is proceeding in this court.[14]

The States' acceded to the court's ordering language, but reserved all objections to the remainder of the August 31 issuance.[15] On September 13, 1999 the Federal Circuit entered a non-precedential order which did not reiterate its prior discussion or question the States' reservation of rights. It stated only: "Pursuant to the court order of August 31, 1999, appeal #99-1328 is dismissed with prejudice. Each party shall bear its own costs."[16]

G. The Original Tenth Circuit Decision

On November 5, 1999, after full briefing on both jurisdiction and merits, but before the scheduled argument, the Tenth Circuit issued a non-precedential opinion granting Appellees' motions to dismiss the appeals, and holding that the Federal Circuit had exclusive appellate jurisdiction, because the district court had addressed and decided Federal Circuit issues. App B-10-11. The court disclaimed jurisdiction, based on "the reasoning . . . [the district court] offered in support of its decision": "interpretation of the FSA was integral to its decisionmaking process" as to whether "substantive rights under the FSA" were violated, App B-10, and whether the FSA itself precluded review of the OHA decision. App B-11.

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[14] No. 99-1327 was an appeal of a separate case brought by other states and territories ("the Jurisdictions"), also as a Motion to Enforce the FSA in MDL 378. That motion did not challenge the OHA decision at issue in the States' motion, but claimed that Chevron had received its funds under the FSA by fraud. The District Court heard both matters together, and dismissed the Jurisdictions' claims in a separate portion of the decision which denied the States' Motion to Enforce. 99-1327 did not raise any DOE Act issues.

[15] The States, on September 1, 1999, stated that "[w]ithout forgoing any other rights or objections they may have in these or any other proceedings, the States have no objection to the entry forthwith of an order in the form specified in paragraph '(1)' of the August 31 order."

[16] The same day, an order to the same effect was entered with regard to No. 99-1356, the appeal of the separate complaint.

The States filed a timely Petition for Rehearing En Banc, and in the Alternative, for Panel Rehearing, asserting that the panel decision was contrary to this Court's decision in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), and the Tenth Circuit decision in Gold v. Local 7 United Food and Commercial Workers Union, 159 F.3d 1307 (10th Cir. 1997). The Petition argued that under these cases, the District Court's DOE Act determination that it lacked authority to hear the case nullified discussion of any merits issues, and the court of appeals was thus barred from considering those merits discussions in assessing appellate jurisdiction. The States also filed a conditional motion pursuant to 28 U.S.C. § 1631, requesting transfer to the Federal Circuit if the Tenth Circuit adhered to its position that the Federal Circuit had exclusive jurisdiction.

H. The Amended Tenth Circuit Decision

On March 6, 2000, the Tenth Circuit panel issued an order purportedly denying the petition for rehearing, but also withdrawing and substantially and substantively amending the original opinion ("to clarify certain issues"), and re-issuing it as a published opinion. App A. The amended opinion acknowledged, as the States had urged, that under Steel, "the district court need only have announced that it lacked jurisdiction over the matter and dismissed the case. . . . As such, we must consider the remainder of the district court's decision dicta." App A-12. The new opinion therefore eliminated the prior opinion's explicit reliance on the district court's merits discussions as implicating the Federal Circuit's exclusive jurisdiction. However, referring to the States' "claims" in the district court, App A-4, A-7, the Tenth Circuit still found "exclusive jurisdiction over these claims" in the Federal Circuit, App A-4, 7-8, because "only where these [Federal Circuit] statutes and their regulations are mere background will this court exercise jurisdiction." App A-9. It saw the case as an "FSA dispute," over which "appellate jurisdiction . . . is exclusively vested in the Federal Circuit." App. A-10. It speculated that if it took the case it would have to face Federal Circuit issues not raised

by the appellants because parts of the Con Ed standing decision (other than the portion relied on by the District Court here) had addressed such issues, and because a provision of the FSA preserved "DOE's prosecutorial discretion," and also because, it claimed, Chevron had raised a defense implicating the FSA. App A-12-13.

Finally, the amended decision denied the States' conditional motion for a § 1631 transfer to the Federal Circuit. The Tenth Circuit ruled that transfer would not be "in the interest of justice," because of what it viewed as the Federal Circuit's "unequivocal declaration . . . that it intended to finally dispose of the States' appeals," and "the States' ample opportunity to pursue these cases in the proper forum." App A-17-18. The court did not address the States' argument that the protective appeals to the Federal Circuit were withdrawn to avoid duplicative litigation of the merits of their appeals at a time when the Tenth Circuit had ordered full briefing and argument of the case on its merits.

It is this amended and reissued decision by the Tenth Circuit, leaving the States without any forum to hear the merits of their appeal, which is the basis for this Petition.

REASONS FOR GRANTING THE WRIT

INTRODUCTION: BEYOND THE STRONG RULE 10 REASONS, REVIEW IS MERITED BECAUSE, BY DENYING BOTH JURISDICTION AND TRANSFER, THE TENTH CIRCUIT LEFT NO FORUM FOR AN IMPORTANT CASE BY PUBLIC OFFICIALS SEEKING TO VINDICATE PUBLIC RIGHTS.

Fourteen states, on behalf of all the states and their oil consuming citizens, have asked a federal court to enforce a massive settlement agreement among the states, the federal government, the oil industry, and most of the nation's largest oil consumers. If the States' case succeeds, and the underlying enforcement case is ultimately won by DOE, the states as a group would receive some $240 million in restitution for their energy conservation and assistance programs, federal taxpayers would receive $240 million

through the U.S. Treasury, and individual oil users claiming injury would share some $120 million. The District Court dismissed the case as involving unreviewable prosecutorial discretion, based on its interpretation of the 1977 DOE Act, a statute indisputably within the Tenth Circuit's appellate authority and outside the Federal Circuit's exclusive jurisdiction. The States asked the Tenth Circuit to review that DOE Act ruling. The Tenth Circuit ruled that it could not do so because the case in the district court made claims under a different statute, and appeals involving that statute are within the Federal Circuit's exclusive jurisdiction. But, as noted below, in 1984, faced with the same jurisdictional objections, the D.C. Circuit, in a case later endorsed by the Federal Circuit, had no problem separating out and deciding (by confirming that OHA is an adjudicator) the same statutory issue raised by the States here.

Unless this Court intervenes, the merits of this appeal by public officials in the public interest will never be heard anywhere. For the Tenth Circuit also ruled that the States' voluntary withdrawal of a protective appeal in the Federal Circuit, to avoid duplicative proceedings at a time when the Tenth Circuit had ordered the case heard on the merits and when issue had not been joined in the Federal Circuit, precluded transfer to the latter court.

The Tenth Circuit has conceded that its first decision in this case was wrong because its reliance on merits discussions below transgressed this Court's rule in Steel. That concession should have removed the perceived bar to Tenth Circuit jurisdiction, but the court retreated to a general assertion that because the underlying dispute involved a Federal Circuit statute, it should cede jurisdiction to that court, a basis which ignores this Court's warning in Bray v. United States that specialized jurisdiction should be construed narrowly, and twenty-five years of decisions in other circuits applying "issue jurisdiction" as the relevant standard. Moreover, even assuming there were concurrent jurisdiction in the two circuits, the Tenth Circuit decision to abstain in favor of the Federal Circuit, when that court cannot hear the case, directly conflicts with this Court's clear declaration in Colorado River that

the critical element in federal-federal abstention is the threat of duplicative proceedings, and with this Court's repeated rulings in other abstention contexts that a *sine qua non* for any abstention is the availability of an adequate alternative forum for the case. Here, of course, there is neither such a threat nor, because the Tenth Circuit will not transfer the case, such an alternative forum.

With all due respect to the court of appeals, a large public case for public benefit should not be treated so cavalierly. The States deserved a straightforward decision on the appeal actually brought, based on an issue clearly within the court's jurisdiction. The D.C. Circuit did so long ago in the same circumstances, without any subsequent serious claim that it was usurping another court's jurisdiction. Had the Tenth Circuit decided the issue, there could have been no serious jurisdictional challenge. Instead, the court has taken a course which subjects it to serious challenge on three different grounds: 1) its violation of the well-established rules of appellate "issue jurisdiction" applicable here, 2) even giving it the benefit of the doubt by assuming there is concurrent jurisdiction, its total disregard for basic standards for abstention, and 3) its total frustration of the intent of the transfer statute. If only to discourage such squandering of judicial resources[17] and judicial credibility and to promote orderly judicial management, this Court should grant certiorari and give the States a chance to have their appeal heard.

I. DECISIONS ON ALLOCATION OF JURISDICTION AMONG FEDERAL COURTS PRESENT IMPORTANT ISSUES OF JUDICIAL MANAGEMENT, FAIRNESS AND PREDICTABILITY WHICH THIS COURT SHOULD ADDRESS IN THE CONTEXT OF THE SERIOUS DEPARTURE HERE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

It is important to the efficient operations of the federal judicial system that courts follow, and appellants can rely on, a consistent

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[17] It was estimated that jurisdictional disputes occupied a third of the decided cases in this field. Texaco v. DOE, 616 F.2d 1193, 1199 (TECA 1979) (Hoffman, J., dissenting).

interpretation of jurisdictional assignments so that cases are initially taken to the proper forum as often as possible, and so that the expenditure of litigants' and judicial resources on jurisdictional disputes is minimized. Issues of divided jurisdiction arise with increasing frequency as Congress establishes more specialized courts, and assigns special tasks to existing courts. *See, e.g.*, Clinton v. Goldsmith, 526 U.S. 529 (1999) (discussing U.S. Court of Appeals for Armed Forces jurisdiction).[18] This Court should grant certiorari to assure consistency in the approach to divided jurisdiction, to prevent erosion of the general appellate jurisdiction of the regional circuits, and to assure that the federal court system in general, and this Court in particular, is not burdened with unnecessary jurisdictional disputes in cases that can and should be decided by the courts which first receive them.

Here, the Tenth Circuit created a jurisdictional morass by conjuring up problems that a straightforward approach would have avoided. It ignored the rulings of this Court and the longstanding practices of the other circuits; it abdicated its own broad jurisdiction without any statutory basis for doing so; it created an avoidable jurisdictional conundrum which only this Court can remedy; it left undecided a legal issue within its jurisdiction on which two other circuits have split; and it left the States with no forum for their appeal. This Court's intervention to provide clear procedural guidance for this and similar cases would prevent this kind of unnecessary jurisdictional improvisation that harms both litigants and the entire judicial system.

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[18] Many, but not all, aspects of Federal Circuit jurisdiction are addressed in 19 James Wm. Moore et al., Moore's Federal Practice, § 208 (Matthew Bender 3d ed. 2000). Other issues of divided jurisdiction arise regarding, for example, the Court of Appeals for the Armed Forces, *see*, 10 U.S.C. § 867, the Court of Appeals for Veterans Claims, *see*, 38 U.S.C. § 7252 (2000), the United States Tax Court, *see*, 26 U.S.C. §§ 7441, 7442, and the United States Court of International Trade, *see*, 28 U.S.C. §§ 251, *et seq.*, and with respect to challenges to actions of, for example, the Federal Energy Regulatory Commission, *see*, 16 U.S.C. § 825*l*(b), and the Environmental Protection Agency, 33 U.S.C. § 1369(b) (2000); 42 U.S.C. § 7607(1).

Federal courts do not create their own jurisdictional boundaries: Congress has "'the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" Akenbrandt v. Richards, 504 U.S. 689, 698 (1992) (citations omitted). The basic statutory jurisdictional assignments to the circuit courts are simple: Congress assigned general jurisdiction over "appeals from all final decisions of the district courts" to the courts of appeals "other than the United States Court of Appeals for the Federal Circuit." 28 U.S.C. § 1291. "The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title." *Id.*

General grants of jurisdiction, which cover all subjects unless specified otherwise, differ from specialized grants, which are strictly limited to the specified subjects or statutes. Bowen v. Massachusetts, 487 U.S. 879, 908, n. 46 (1988) (citation omitted) (statute conferring general jurisdiction on district courts is interpreted broadly, while statute conferring limited subject matter jurisdiction must be given a "'narrow interpretation'" and "'strictly construed'"). The specialized Federal Circuit jurisdiction at issue here, 28 U.S.C.§ 1295(a)(11) and (12), was inherited from TECA. App A-8. This Court ruled 25 years ago that the grant to TECA "carved out a limited exception to the broad jurisdiction of the courts of appeals over 'appeals from all final decisions of the district courts of the United States.'" Bray v. United States, 423 U.S. 73, 74 (1975) (citation omitted). This Court, *id.* at 75, also approved TECA's prior narrow interpretation of its jurisdiction in United States v. Cooper, 482 F.2d 1393, 1398 (TECA 1973)("loose construction [of TECA jurisdiction] is unacceptable in light of the traditional rule that courts of special jurisdiction should strictly construe their statutory grants of jurisdiction").

The courts of appeals, including TECA and the Federal

Circuit, as well as Congress, recognize that the grant of limited jurisdiction to TECA was "issue" jurisdiction, *i.e.*, determined as to each issue actually raised on appeal, as opposed to "case" jurisdiction, determined by the presence of the assigned subject in the underlying case and extending to the entire case, including issues falling outside of the subjects assigned to the special court. For example, Federal Circuit patent jurisdiction covers all issues in a case brought at least in part under the patent statute, because the statutory language applies to "'cases' in which the district court's jurisdiction 'was based, in whole *or in part*, on Section 1338.'" Atari, Inc. v. JS& A Group, Inc., 747 F.2d 1422, 1430 (Fed. Cir. 1984) (en banc)(emph. in original). That "case" jurisdiction contrasts with the "issue jurisdiction" the Federal Circuit inherited from TECA, because "[t]he clause 'in whole or in part' is absent from the TECA authorization." Texas American Oil Corp. v. DOE, 44 F.3d 1557, 1564 (Fed. Cir. 1995) (en banc).

Thus the uniform view of courts of appeals until this case has been that in this type of assignment, "[t]o decide whether or not we have jurisdiction to hear an appeal, we look at the nature of the issue presented to us and not to the nature of the case or controversy below." MGPC, Inc. v. DOE, 673 F.2d 1277, 1281 (TECA 1982). The court must "conduct a jurisdictional inquiry into each claim raised . . . on appeal." United States v. Wyatt, 680 F.2d 1080, 1085 n.7 (5th Cir. 1982). This Congressional direction is so strong that the courts of appeals have not hesitated to bifurcate cases when necessary to have the proper issues decided in the proper court. *See, e.g.*, Coastal States Marketing, Inc. v. New England Petroleum, 604 F.2d 179, 185 (2d Cir. 1979) (TECA's issue jurisdiction has resulted in "the development of a system of bifurcated appeals from unitary judgments"); *see also*, Scallop Corp. v. Tully, 705 F.2d 645, 650 (2d Cir. 1983). This clear dichotomy between patent-type appellate jurisdiction and that under the price control statutes was evident to members of this Court and

to Congress,[19] which reassigned the TECA authority to the Federal Circuit without altering this feature.

In this case, the Tenth Circuit had clear precedent for accepting jurisdiction over the issue raised by the States, an issue outside the Federal Circuit's limited assignment. In ARCO, the D.C. Circuit had also been asked to determine whether the DOE Act permitted DOE to delegate adjudicatory authority to the Office of Hearings and Appeals, or restricted OHA to a prosecutorial role, the precise question raised in this case. That appeal also raised other issues within TECA's jurisdiction, but the D.C. Circuit ruled that it was required to address the DOE Act issue, and to leave the other issues to TECA (where a protective appeal had been stayed). The D.C. Circuit had no problem separating and deciding the DOE Act issue.[20] Moreover, the Federal Circuit later endorsed ARCO's jurisdictional holding. Phoenix Petroleum, 95 F.3d at 1564-65. (Fed. Cir. 1996).

Thus, the Tenth Circuit had before it an appeal (a) within its general appellate authority, and outside the specific authority of the Federal Circuit, (b) in a field where this Court had instructed that

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[19] Christianson v. Colt Industries, 486 U.S. 800, 820, n. 1 (1988) (Stevens, J., joined by Blackmun, J., concurring) (TECA "has jurisdiction over *issues* not *claims*") (emph. in original), citing H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 41 (1981), in turn citing Coastal States Marketing, Inc.

[20] Reviewing the same statutory history and terms of the DOE Act as control here, ARCO concluded, as DOE urged, that although the Act provided for FERC review of remedial orders, it did not preclude a further level of adjudication within DOE, or limit DOE to investigatory and prosecutorial functions. 769 F.2d at 785-791. Thus DOE could, through OHA, provide a "two-tiered adjudication." 769 F.2d at 796. In Texaco, TECA itself declined jurisdiction over the reviewability under the DOE Act (in that case, by FERC) of an OHA order involving the statutes assigned to TECA. The court rejected the argument that "because . . . [the DOE Act] issue is part of a larger 'case or controversy' arising under the Emergency Petroleum Allocation Act (EPAA)," it had jurisdiction. 616 F.2d at 1195. Rather, because "[j]urisdiction is to be strictly construed," the DOE Act issue fell within the general jurisdiction of the regional circuits. 616 F.2d at 1198.

the specialized jurisdiction was to be construed narrowly, (c) where numerous appellate decisions, recognized by Congress and members of this Court, established that the focus is on "*issues* not *claims*," n.19, *supra*, (d) where bifurcation of cases was customary, (e) where a regional circuit had long ago exercised jurisdiction on the precisely the same issue, with the subsequent endorsement of the specialized court, and (f) under circumstances in which no regional circuit had ever declined jurisdiction.[21] In this situation, a strong presumption should have attached that jurisdiction lay in the Tenth Circuit. What could overcome that presumption? Certainly it could not be Congress' desire to have the specialized court decide DOE Act issues: Congress had simply not chosen to add this subject to TECA's authority when it wrote the DOE Act in 1977. In fact, if this case were transferred to the Federal Circuit, its own precedents would require it to look to Tenth Circuit law in deciding the DOE Act issue,[22] the very law which the Tenth Circuit has declined to declare. Certainly, the Tenth Circuit was not looking for the other court's guidance: it had no intention to transfer the case to that court. The Tenth Circuit's reliance on the nature of the underlying case (FSA issues more than "mere background"), was clearly inconsistent with the nature of its "issue" jurisdiction. The court's speculative (and on its face unjustified) apprehension that other Federal Circuit issues might arise if it took the case -- issues not raised by appellants (and, even if discussed by the district court, nullified by Steel)-- could not be a sufficient basis for abdicating clearly available issue jurisdiction,

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[21] The other Tenth Circuit cases relied upon by the court here, Mobil Oil Corp. v. DOE, 983 F.2d 172 (10th Cir. 1992) and Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979), involved appeals in which the specialized court issues were central to the district court decisions and essential to resolution of the appeals. *See* App. A-8-9.

[22] *See*, Consumers Power Co. v. DOE, 894 F.2d 1571, 1579 (TECA 1990). In Texas American, 44 F.3d at 1561, the Federal Circuit adopted TECA precedent on both substantive and jurisdictional matters in cases that reach the Federal Circuit as successor to TECA. .

especially when remand or bifurcation were fully available in the event such issues did arise.[23]

A court "may not in any case, even in the interest of justice, extend its jurisdiction where none exists." Christianson v. Colt Industries, 486 U.S. at 818. But it is not required to, and should not, search for new rationales -- not mandated by Congress and inconsistent with the precedents -- to restrict its jurisdiction. If federal courts improvise rules for allocating jurisdiction, the credibility, efficiency, and predictability of the judicial system will be at risk. The goal should be, as this Court has noted in another jurisdictional context, a simple rule "'that will not invite extensive threshold litigation over jurisdiction'" because "'litigation over whether the case is in the right court is essentially a waste of time and resources." Navarro Savings Ass'n v. Lee, 446 U.S. 458, 464 n.13 (1980) (citations omitted).

Here, the result is more than "exasperating for the litigants (and wasteful for all concerned)." Christianson, , 486 U.S. at 818. The litigants here lost even the chance for the "jurisdictional ping pong" this Court decried in Christianson. Since appellants cannot proceed in the other forum, the States' case will be set adrift in a Bermuda triangle from which there is no return. The Tenth Circuit's departure from the normal course of judicial proceedings and the need for an exercise of this Court's supervisory power to assure the integrity, efficiency and fairness of the federal court system are manifest. Only the grant of this petition can provide a remedy that will resolve this case fairly and also provide general guidance to avoid future such departures from logic and justice.

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[23] Plainly, the only such issues it listed, App A-12-14; pp.10-11, *supra*, were not present. The district court's reviewability decision relied on none of the non-DOE Act holdings in Con Ed, *see* pp.5-6, *supra*; on its face, the FSA's reference to prosecutorial discretion (if reachable at all under Steel) did not purport to alter the status quo, *see* p. 6, *supra*; and the purported FSA defense was in fact a DOE Act defense. *See* App A-13, citing Chevron's 99-3065 Brief at 35.

II. THE CHALLENGED DECISION DIRECTLY CONFLICTS WITH THIS COURT'S BASIC ABSTENTION RULES: EVEN IF THE TENTH CIRCUIT HAD SOME DISCRETION TO DEFER TO ANOTHER FEDERAL COURT, SUCH ABSTENTION IS NOT APPROPRIATE WHERE THERE IS NO THREAT OF DUPLICATIVE PROCEEDINGS AND WHERE THE OTHER COURT CANNOT PROVIDE AN ADEQUATE ALTERNATIVE FORUM.

Respondents will surely invoke, as they did below, TECA and Federal Circuit decisions holding that, presented with an appeal within its jurisdiction, the specialized court could assert jurisdiction over "subsidiary" or other issues required to be considered "in the course of deciding the issue before the court." Phoenix Petroleum Co. v. FERC, 95 F.3d at 1563. Even assuming these decisions can be reconciled with this Court's decisions barring judicial extensions of jurisdiction, *see* pp. 15, 19, *supra*, they do not require or even authorize the abdication of jurisdiction by the Tenth Circuit here. The fact that the Federal Circuit, in a case properly before it because the central issues on appeal are Federal Circuit issues, might also decide an ancillary issue outside its exclusive jurisdiction does not mean that the Tenth Circuit, presented with an appeal centered on that non-exclusive issue, is required, or even allowed, not to decide that issue. Nothing in §1291, § 1295, or this Court's relevant decisions or in any other regional circuit's decisions suggests such a rule.

On the contrary, even if its action is deemed to be a case of discretionary abstention in favor of a court with concurrent jurisdiction, the Tenth Circuit would have, in the words of Rule 10, decided an important federal question *either* in a way that conflicts with relevant decisions of this Court, *or* that has not been, but should be settled by this Court. In the field of abstention, this Court has spoken frequently and in detail and has given certain bright-line answers with which the Tenth Circuit's decision clearly and directly conflicts. The Court should therefore grant the Writ in order to cure that conflict and to provide supervisory guidance to the appellate courts so that they do not begin down a new, perilous, and impermissible path of abstention from their Congressionally-

granted jurisdiction.

In dealing with abstention, this Court begins with the proposition that "the normal principle [is] that federal courts should adjudicate claims within their jurisdiction. . . ." Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995). They have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976) (Opinion of Court), *and* at 821 (Stewart, J., dissenting but agreeing on this point). While that case and most abstention cases deal with various forms of federal-state abstention based on principles of federalism and avoidance of unnecessary federal constitutional interpretation (*see generally,* 17 Moore's Federal Practice, *supra,* at § 122) the basic "unflagging obligation" principle has also been applied to federal-foreign abstention, *e.g.*, Turner Entertainment Co. v. Degeto Film, 25 F.3d 1512 (11th Cir. 1994), and generally to all federal cases. *See, e.g.*, Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 496-97 (1971) ("it is a time honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it. Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed. 257, 291 (1821)").

As it has expanded its abstention rules to new needs of "wise judicial administration," this Court has listed factors to be applied: "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required. . . . Only the clearest of justifications will warrant dismissal." Colorado River, 424 U.S. at 818-19.

In this Court's most specific discussion of federal-federal deference, in Colorado River, the Court stated that

> there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions,

> either by federal courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation." . . . [citations omitted] . . . . As between federal district courts, however, though no precise rule has evolved, *the general principle is to avoid duplicative litigation.* [424 U.S. at 817 (emph. added)]

Since there is no difference between district courts and circuit courts for these purposes, the first question in a federal-federal deference context must be: is abstention necessary to avoid duplicative proceedings? Here the answer is clearly no. No other proceeding is pending or even possible. Since the protective appeals in the Federal Circuit were dismissed "with prejudice" (presumably meaning "with prejudice to reinstatement," *see*, Fed. Cir. Rule 27(h)(1)), and the time for filing a new appeal has expired, no action at all is possible in that court, let alone a duplicative action. Only if the Tenth Circuit transfers all or part of the case to the Federal Circuit can there be any case there, and the Tenth Circuit will not do so. Thus the threshold test of this Court's "general principle" is not met.

But there is more. In every variation of its abstention rules, both federal-state and federal-foreign, a central factor applied by this Court and uniformly by the courts of appeals "counseling against" abstention is the fact that the alternative forum to which a federal court might defer is "in some respect inadequate to resolve" the matters at issue. *See, e.g.*, Colorado River, 424 U.S. at 820; Deakins v. Monaghan, 484 U.S. 193, 204-05 (1988) (the district court has no discretion to dismiss rather than to stay claims that cannot be redressed in the alternative state proceeding); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 28 (1983) (in order to abstain from jurisdiction, a federal court must determine whether the "parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. . . . *If there is any substantial doubt as*

to this, it would be a serious abuse of discretion to grant the stay or dismissal at all.") (emph. supplied); *see generally*, 17 Moore's Federal Practice, *supra*, § 122.

The importance of an adequate alternative forum to deal with the litigant's claims is almost definitional: a key element of a court's decision whether to defer to another court with concurrent jurisdiction must be whether the court deferred to can and will exercise the jurisdiction being ceded to it. *See, e.g.*, Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 559-60 (1983). The present case presents a clear and compelling opportunity for this court to clarify and explicitly apply its generic abstention rules to federal-federal abstention, so as to serve both the interests of wise judicial administration and fairness to litigants. The Tenth Circuit's failure to consider any relevant abstention factors,[24] and the resulting total extinguishment of a claim by sovereign states for public benefit because the Tenth Circuit declined to exercise its available jurisdiction and deferred to a court with no ability to take the case, commends the case for this Court's review.

III. This Court Should Exercise Supervisory Power to Prevent The Transfer Statute -- Intended to Insure a Proper Forum For Litigants Who Find Themselves in The Wrong Court and to Avoid the Need to Proceed in Two Courts at Once -- From Being Turned on Its Head So as to Deny Any Forum Because a Litigant Chose Not to Proceed in Two Courts at Once.

The Transfer Statute, 28 U.S.C. § 1631, provides that when a federal court finds want of jurisdiction, "the court shall, if it is in the interest of justice, transfer such action or appeal to any other court in which the action or appeal could have been brought at the

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[24] Besides the inadequate alternative forum, other factors counsel against abstention here: the case was, in good faith, filed first in the Tenth Circuit, and had been fully briefed and was ready for argument in that court, whereas only the filing (and withdrawal) of the protective appeals had occurred in the alternative forum. *See, e.g.*, Moses H. Cone, 460 U.S. at 21-2.

time it was filed." The intent of Congress in §1631, with TECA explicitly in mind, was to preserve causes of action, *without* the necessity of proceeding in two courts at once, by providing a proper forum when, because of uncertainty as to jurisdiction as between courts, a litigant finds itself in the wrong forum. *See*, S.Rep. No. 275, 97th Cong. 1st Sess. 11 (1981), *reprinted in*, 1982 U.S. Code Cong. & Admin. News at 21.

Here, although the Tenth Circuit thought the basic conditions of §1631 were met, it applied the "interest of justice" standard to refuse transfer solely because the States, in order to avoid going forward on the merits in two courts at once, withdrew protective appeals to the Federal Circuit before issue was joined in that court. Plainly this result directly contradicts congressional intent in § 1631. "Normally transfer [under § 1631] will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is 'time consuming and justice-defeating.'" Miller v. Hambrick, 905 F.2d 259, 262 (9th Cir. 1990), citing, Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467 (1962). The "interest of justice" standard is satisfied where suit was filed in good faith in what was later ruled to be the "wrong" forum, and a new appeal to the court with jurisdiction would be time-barred. *See, e.g.*, Coleman v. United States, 106 F.3d 339, 341 (10th Cir. 1997).

Nothing in the text of §1631, its legislative history, or its judicial interpretation indicates that the withdrawal of a protective notice of appeal in another court, in order to avoid duplicative litigation on the merits of the case, removes the protections Congress intended for litigants who find themselves in the wrong forum. On the contrary, the States' action comported with Congress' intent: as this Court stated with regard to the analogous venue transfer statute, "[w]e have made quite clear that '[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.'" Ferens v. John Deere, 494 U.S. 516, 531

(1990), quoting Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960). Congress enacted § 1631 so that proceeding in two courts at the same time would no longer be "the litigant's main protective device." S.Rep. No. 275, *supra*, at 11.[25]

Moreover, the denial of transfer here, based on the prospective transferee court's *dicta* in prefatory comments to a nonprecedential proposed order granting a voluntary dismissal, is in conflict with this Court's decision in Christianson and with basic legal principles applicable to claim preclusion. In Christianson, this Court made clear that when a transferor court makes the decision on transfer, the transferee court must treat it as the "law of the case," to be accepted unless "clearly erroneous." 486 U.S. at 819. Therefore, had the Tenth Circuit transferred the case to the Federal Circuit, that court would have been required to accept it as long as it found the jurisdictional findings "plausible." *Id.* The Tenth Circuit turned this principle on its head, by considering itself barred from transfer based on informal comments not contained in the Federal Circuit's final order. The Federal Circuit never had the issue of transfer properly before it, nor could it decide or preclude any issue in the protective appeals, since they were withdrawn before issue was joined. Thus, the Tenth Circuit's statement that the Federal Circuit intended to "finally dispose" of the States' claims is legally erroneous and makes no sense: this Court has made clear that "[i]f the first suit . . . was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." Costello v. United States, 365 U.S. 265, 286

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[25] Despite this added protection, as noted above, n.11, *supra*, the clear judicial instructions in this field and consistent practice for over 20 years, pre- and post- §1631, has been to file protective appeals. The Tenth Circuit placed the States in a worse position than they would have been had they not followed this standard procedure, even though the choice the States faced -- which court to proceed in -- was the same choice protected by §1631.

(1961) (citation omitted).[26] Voluntary dismissal prior to even the designation of any issues presented for review, much less briefing or decision of those issues, cannot be transmuted into a decision on the merits of the States' claims foreclosing the assertion of those claims in a later-transferred case.[27]

In sum, the lower court's unprecedented interpretation of the "interest of justice" standard in § 1631, in flagrant violation of Congressional intent and of judicial precedent, calls for an exercise of this Court's supervisory powers, especially when the dismissal truncates without any possible forum an appeal seeking to vindicate the public's interest and the States' rights in a massive court-approved settlement between the states and the federal government.

CONCLUSION

For the reasons stated herein, this Petition for Writ of Certiorari should be granted with respect to each of the questions presented, and, if appropriate, the decision below dismissing the appeals for lack of jurisdiction should be summarily reversed.

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[26] Moreover, the conditions which can be placed upon a voluntary dismissal are limited to the payment of costs and other fees. Shellman v. United States, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976). No case suggests that such dismissals can be conditioned upon a prohibition of any later transfer.

[27] Obviously, since its ruling on the dismissal motion acknowledged that the Tenth Circuit case would proceed, the Federal Circuit understood that it was not adjudicating the merits, and it rejected Chevron's invitation to dismiss for failure to file briefs. The label "with prejudice" cannot change the fact that the merits were not adjudicated, and cannot bar a future action. Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 570, 572 (5th Cir.), *aff'd en banc*, 101 F.3d 367 (5th Cir.1996), *cert. denied*, 520 U.S. 1168 (1997) (dismissal designated as "with prejudice" on *forum non conveniens* grounds is not a *res judicata* bar because not "on the merits"). *See also*, Criales v. American Airlines, Inc., 105 F.3d 93, 97, 98 (2d Cir.), *cert. denied*, 522 U.S. 906 (1997) (citation omitted) ("[W]e would not permit the choice of labels to distort substance, especially where the consequences would be so drastic as to deprive a party of the opportunity to be heard. . . . 'In properly seeking to deny a litigant two 'days in court,' courts must be careful not to deprive him of one'").

Respectfully submitted,

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June 5, 2000

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN RE: THE DEPARTMENT OF ENERGY
STRIPPER WELL LITIGATION.

THE STATES OF ALABAMA,
CALIFORNIA, CONNECTICUT, IDAHO,
INDIANA, MARYLAND, MICHIGAN,
MISSISSIPPI, MONTANA, OHIO,
SOUTH DAKOTA, VERMONT,
WISCONSIN and WYOMING,
Plaintiffs-Appellants,
v.
UNITED STATES DEPARTMENT OF
ENERGY and CHEVRON U.S.A. INC.,
Defendants-Appellees. No. 99-3065

THE STATES OF ALABAMA, No. 99-3066
CALIFORNIA, CONNECTICUT, IDAHO,
INDIANA, MARYLAND, MICHIGAN,
MISSISSIPPI, MONTANA, OHIO,
SOUTH DAKOTA, VERMONT,
WISCONSIN and WYOMING,
Plaintiffs - Appellants,
v.
UNITED STATES DEPARTMENT OF
ENERGY, Hazel O'Leary, Secretary;
OFFICE OF HEARINGS AND APPEALS,
Department of Energy, George B. Breznay,
Director,
Defendants - Appellees,
and
CHEVRON, USA, INC.,
Intervenor-Defendant- Appellee.

DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND and WEST VIRGINIA, THE TERRITORY OF GUAM AND THE VIRGIN ISLANDS,
Plaintiffs-Appellants,
v.
UNITED STATES DEPARTMENT OF ENERGY, and CHEVRON U.S.A., INC.
Defendants-Appellees.

No. 99-3102

ORDER
Filed March 6, 2000

Before EBEL, HOLLOWAY, and KELLY, Circuit Judges.

These matters are before the court on appellants' petition for rehearing with suggestion for rehearing en banc. Upon review, the panel has determined rehearing is not warranted. Consequently, the petition is denied. We have decided, however, that amendment of our original Order and Judgment, filed on November 5, 1999, is appropriate to clarify certain issues. We have also determined publication is warranted. Accordingly, an amended published opinion is attached to this order.

The mandate issued on November 5, 1999 is recalled and reissued forthwith in accord with our amended disposition. A copy of the rehearing petition was circulated to all the active members of the court. No judge having called for a poll, the en banc suggestion is denied.

Entered for the Court
PATRICK FISHER, Clerk
by:
Elisabeth A. Shumaker
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[SAME CAPTION AS ABOVE]

Appeal from the United States District Court
for the District of Kansas

(D.C. Nos. 79-CV-378, 96-CV-1180-MLB, and 97-CV-378)

Submitted on the briefs:[1](*)

Bill Lockyer, Attorney General, and Yeoryios Apallas, Deputy Attorney General, San Francisco, California, for Plaintiff-Appellant State of California.
James F. Flug and Paula Dinerstein, Duncan, Weinberg, Genzer & Pembroke, P.C., Washington, D.C., for Plaintiffs-Appellants States of Alabama, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin and Wyoming.
Stephen C. Skubel and Paul T. Michael, United States Department of Energy, Washington, D.C., for Defendant-Appellee United States Department of Energy.
Robert M. Westberg, Pillsbury, Madison & Sutro LLP, San Francisco, California, for Defendant-Appellee and Intervenor-Defendant-Appellee Chevron U.S.A. Inc.
Bernard Nash and Andrew P. Miller, Dickstein, Shapiro, Morin & Oshinsky LLP Washington, D.C., for Plaintiffs-Appellants States of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North

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[1](*) After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cause therefore is ordered submitted without oral argument.

Carolina, Rhode Island and West Virginia, the Territory of Guam and the Virgin Islands.

Before EBEL, HOLLOWAY and KELLY, Circuit Judges.

EBEL, Circuit Judge.

Plaintiffs-Appellants challenged a decision by the Department of Energy; the District of Kansas denied their claims, and they now seek review in this court. Defendant-Appellees have moved this court to dismiss these appeals for lack of appellate jurisdiction, and Appellants have opposed these motions. We find that the Federal Circuit has exclusive jurisdiction over these claims pursuant to 28 U.S.C. § 1295(a)(11)-(12), and Appellees' motions to dismiss cases 99-3065,
99-3102, and 99-3066 are therefore GRANTED.

BACKGROUND

Plaintiffs-Appellants in cases 99-3065 and 99-3066 are the states of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin, and Wyoming (the "States"). Plaintiffs-Appellants in case 99-3102 are the states of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Rhode Island, and West Virginia, as well as the territories of Guam and the Virgin Islands (the "Jurisdictions;" the States and the Jurisdictions are collectively referred to as "Appellants"). Appellants sued Defendants-Appellees United States Department of Energy ("DOE") and Chevron U.S.A. Inc. ("Chevron;" DOE and Chevron are collectively referred to as "Appellees") in connection with a settlement agreement purporting to resolve the Stripper Well Litigation.[1](1) That litigation concerned

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[1]The present controversy between Appellants and Appellees took the form of three separate lawsuits. First, the States filed a motion to enforce the agreement in the District of Kansas, which was responsible for approving and overseeing the agreement under its Multi-District Litigation 378 ("MDL 378")

the proper disbursement of over $1 billion in overcharge funds collected by DOE pursuant to crude oil price controls imposed under the Economic Stabilization Act of 1970 ("ESA") and the Emergency Petroleum Allocation Act of 1973 ("EPAA"). In 1986, a multitude of interested parties, including the States and the Jurisdictions, entered into the Final Settlement Agreement ("FSA"), which apportioned these and subsequently recovered funds among DOE (40%), the fifty states and several territories (40%), and reserved the remainder to settle individual claims (primarily those of utilities and oil refineries). The FSA was approved by Judge Theis of the District of Kansas, pursuant to that court's MDL 378 jurisdiction. Although intended to end this controversy, the FSA has itself been the subject of extended litigation.

At the center of the present case is a decision by the Department of Energy not to seek from Chevron some $500 million, which Appellants maintain should then be disbursed under the FSA. In 1992, DOE's Economic Regulatory Administration ("ERA") issued a Proposed Remedial Order ("PRO") alleging that Chevron had improperly represented its status under the now-defunct Tertiary Incentive Program ("TIP"),[2] and that it therefore must disgorge

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docket. That is now case No. 99-3065 before this court. Second, the States filed an original complaint in the same district court, docket No. 96-CV-1180, which is now case No.
99-3066 before this court. Third, the Jurisdictions filed a separate motion to enforce the agreement under the MDL 378 docket, advancing a different theory than the States. That is now case No. 99-3102 before this court. All of these cases concern the same disputed DOE decision. We consolidated cases 99-3065 and 99-3102, and companioned 99-3066 for oral argument. This opinion addresses the Appellees' Motions to Dismiss for Lack of Appellate Jurisdiction filed in each case.

[2]The TIP was a DOE program designed to increase domestic oil production and thus reduce the country's dependence on foreign oil. Under TIP, companies that extracted oil using more difficult and costly "tertiary" methods were allowed to sell that oil at full market value, instead of at the government-imposed price, in order to recoup the additional expense. Because some refiners had greater access to price-controlled oil than others (who were

$124,989,588 it had received under the program (with interest, the sum exceeds $500 million). Chevron challenged the PRO and the matter was referred to DOE's Office of Hearings and Appeals ("OHA").

The OHA declined to enforce the PRO as a final Remedial Order, finding that "the ERA has failed to establish[] that Chevron was in fact unjustly enriched by its participation in the TIP as alleged in the PRO." (OHA Decision at 12-13.) As a result, none of the Appellants received additional disbursements under the FSA. After the OHA issued its decision in 1996, a group of private parties, who stood to recover additional funds as individual claimants under the FSA, directly challenged the ruling in the District of Columbia District Court. That claim, however, was rejected by the Federal Circuit. *See* Consolidated Edison v. O'Leary, 131 F.3d 1475 (Fed. Cir. 1997) (dismissing plaintiffs' claim because the OHA's decision was not reviewable); cf. Consolidated Edison v. O'Leary, 117 F.3d 538 (Fed. Cir. 1997) (dismissing claims for lack of a private right of action and because the OHA's decision was not justiciable).

In 1996, the States and Jurisdictions brought the present actions in the District of Kansas, challenging the same OHA decision. That court, however, dismissed all three suits. In its order denying both the States' and the Jurisdictions' motions to enforce the FSA (Nos. 99-3065 & 99-3102 before this court), the district court identified several reasons why these actions were improper. First addressing the States' claims, it cited the Federal Circuit's recent decisions regarding this controversy and found that "OHA's dismissal of the

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forced to pay full market value), DOE also implemented the Entitlements Program, which required that refiners with such greater access purchase "entitlements" from other refiners. The price of the entitlements corresponded with the difference between the market and controlled prices, the goal being to avoid penalizing refiners buying TIP oil at full price. DOE issued an annual Entitlements Notice, detailing which refiners were over or under their allotted entitlements and requiring settlement of these accounts.

proposed remedial order against Chevron was a part of DOE's prosecutorial function and as such, was unreviewable." (*Id.* at 13.)

Discussing the Jurisdictions' claims, the court engaged in an analysis of the FSA. The Jurisdictions alleged that Chevron "'fraudulently misled' the court and the parties [to the FSA] by misrepresenting its status as an entitlements seller under the draft 1981 Entitlements Notice [upon which the FSA distributions were based.]" (*Id.* at 4.) Specifically, the Jurisdictions argued that when Chevron claimed certain tax credits after DOE discontinued the Entitlements Program, it automatically decertified itself as an entitlements seller under the TIP. (*See id.*) The court responded, however, that "[t]he jurisdictions assume that, in 1983, Chevron had to elect between a windfall profit tax refund and remaining on the entitlements list. There is nothing in the FSA requiring such an election." (*Id.* at 15.) The court further found that "tax matters were excepted from the settlement by Proviso (E) to the Refiners Release," and that "the FSA imposed no obligation on Chevron as a settling refiner to disclose its pending windfall profit tax refund claim." (*Id.* at 16.) Thus, its denial of the Jurisdictions' motion required a close inquiry into the terms of the FSA.

That same day, the district court issued a separate order dismissing the States' original complaint (No. 99-3066 before this court). The court specifically incorporated its findings in the MDL order, and dismissed the States' FSA claims on those grounds. (*See* Order of Dismissal at 2.) The States had also challenged DOE's interpretation of the TIP regulations, DOE's legal authority to issue or amend its regulations, and DOE's compliance with the Administrative Procedure Act and the Department of Energy Organization Act. The court dismissed these claims for lack of standing or, alternatively, for lack of proper venue. (*See id.* at 1-4.)

The States and Jurisdictions now seek review in this court. Appellees DOE and Chevron filed motions to dismiss for lack of appellate jurisdiction in each case, alleging that exclusive appellate

jurisdiction over these claims lies with the Federal Circuit. For the reasons stated below, we agree.

DISCUSSION

A. Federal Circuit Jurisdiction

28 U.S.C. § 1295(a) provides that "[t]he United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . (11) of an appeal under section 211 of the Economic Stabilization Act of 1970; (12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973." Among the relevant provisions of the ESA and the EPAA were the crude oil price controls, which formed the basis for the controversy resolved by the FSA. The Federal Circuit succeeded to this jurisdiction upon abolition of the Temporary Emergency Court of Appeals ("TECA") in 1993. *See* Pub. L. 102-572 § 102(d), (e) (1992). Thus, this court cannot exercise jurisdiction over appeals "under" these statutes.

B. Tenth Circuit Authority

The Tenth Circuit has carefully avoided encroaching on the exclusive jurisdiction of the Federal Circuit and its predecessor, TECA. In Mobil Oil Corp. v. United States Dep't of Energy, 983 F.2d 172 (10th Cir. 1992), this court found that a dispute over moneys claimed by DOE in restitution proceedings against an oil company involved issues arising under the ESA and EPAA and required interpretation of the ESA and EPAA, and was therefore subject to TECA's exclusive jurisdiction. *See id.* at 175-76. The court found that the issue of liability for restitution was "intertwined with the ESA and EPAA," and therefore could not properly be removed from TECA's domain. *Id.* at 176. The court also noted that "[a]nother Tenth Circuit decision recognizes TECA's jurisdiction when interpretation of price ceilings regulations imposed by the ESA and EPAA cause a contract dispute between

the parties." *Id.* (citing Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979)). The Tenth Circuit has never exercised jurisdiction over a disputed issue arising under the FSA.

Appellants argue that our decision in In re Seneca Oil, 906 F.2d 1445 (10th Cir. 1990), points in favor of jurisdiction over the present case. This argument is incorrect. In Seneca Oil, the court held that where ESA/EPAA issues are merely a backdrop to an independent claim, jurisdiction may obtain. "This appeal," the court wrote, "is not from an action to enforce DOE regulations or to obtain an order of restitution; rather it is from a decision regarding the priority of the restitution claim in bankruptcy." *Id.* at 1454. Moreover, the court was careful to note that TECA's exclusive jurisdiction with respect to the ESA and EPAA is not to be narrowly construed: "Thus, the phrase 'arising under' is interpreted more expansively for purposes of TECA's jurisdiction than it is for purposes of the federal question jurisdiction of the district courts. For example, unlike federal question jurisdiction, the TECA's jurisdiction can be created by defenses that raise ESA/EPAA issues." *Id.* at 1454 n.1 (emphasis added). In sum, only where these statutes and their regulations are mere background will this court exercise jurisdiction.

The question remains, therefore, whether appeals relating to the FSA arise under the ESA and EPAA, or whether those statutes merely provide a backdrop for independent claims. In the absence of Tenth Circuit precedent speaking directly to this issue, we find it useful to seek guidance from the Federal Circuit's extensive dealings with the FSA. As a preliminary matter, we note that the Federal Circuit expressly held "that the TECA precedent and practice on jurisdictional matters shall continue to apply to cases that reach the Federal Circuit by virtue of succession to the TECA." Texas American Oil Corp. v. United States Department of Energy, 44 F.3d 1557, 1564 (Fed. Cir. 1995). Accordingly, we look to both Federal Circuit and TECA authority in making this inquiry.

Such a review reveals that appellate jurisdiction over FSA disputes is exclusively vested in the Federal Circuit. In In re Dep't of Energy Stripper Well Exemption Litigation, 864 F.2d 796 (Temp. Emer. Ct. App. 1988), the court held that "the case before the district court of Kansas, No. 10-76 [MDL 378 Stripper Well Litigation] seeking interpretation of the Final Settlement Agreement to resolve a dispute between two signatories to that Agreement, [is] a cause of action arising out of federal law, specifically out of the laws and regulations concerning the Economic Stabilization Act." *Id.* at 799. Given the plain logic of this conclusion, as well as the experience and expertise of the Federal Circuit in interpreting the FSA, we hold that if a controversy presents an issue of interpretation of the FSA, 28 U.S.C. § 1295(a)(11) grants exclusive appellate jurisdiction to the Federal Circuit.

We also note that the exclusive jurisdiction of the Federal Circuit obtains where a party raises an ESA/EPAA issue as a defense. *See* In re Seneca Oil, 906 F.2d at 1454 n.11 ("[T]he TECA's jurisdiction can be created by defenses that raise ESA/EPAA issues."); Texas American Oil Corp. v. United States Dep't of Energy, 44 F.3d 1557, 1563 (Fed Cir. 1995) ("The TECA has exercised jurisdiction of any EPAA/ESA issue whether presented by complaint, as a defense, or as a counterclaim.); Phoenix Petroleum Co. v. United States Fed'l Energy Regulatory Comm'n 95 F.3d 1555, 1563 (Fed. Cir. 1996). It follows from the above discussion that where a party raises the FSA as a defense, the claim "arises under" the ESA and EPAA and therefore vests exclusive jurisdiction in the Federal Circuit.

C. Nature of the Present Case

(1) The Jurisdictions' MDL 378 Case (No. 99-3102)

In their opposition to Appellees' motion to dismiss, the Jurisdictions admit that "[t]he Jurisdictions' claims are all based on enforcing the FSA." (Jurisdictions' Opposition at 3.) As we have previously

stated, claims under the FSA are within the exclusive jurisdiction of the Federal Circuit and thus cannot be considered by this court. The Jurisdictions cite several TECA and Federal Circuit cases for the proposition that FSA claims do not arise under the ESA or EPAA. (*See* Jurisdictions' Opposition at 3-4.) None of these cases, however, directly addresses this point; moreover, the Jurisdictions fail to discuss TECA's 1988 In re Stripper Well case explicitly finding that FSA claims do indeed arise under those statutes. Thus, because the Jurisdictions' claims are based on the FSA, the Federal Circuit has exclusive jurisdiction.

(2) The States' MDL 378 Case (No. 99-3065)

In their brief, the States have carefully phrased the issues presented to this court to avoid any mention of the FSA. They ask this court: "Did the lower court err in ruling that the 1977 Department of Energy Organization Act ("DOEOA") requires the challenged order of the Department of Energy's Office of Hearings and Appeals to be deemed an unreviewable act of prosecutorial discretion?" (States' 99-3065 Br. at 3.) Moreover, they urge that in evaluating jurisdiction we must "'look at the nature of the issue presented to us and not to the nature of the case or controversy presented below.'" (States' 99-3065 Opposition at 2 (quoting MGPC, Inc. v. DOE, 673 F.2d 1277, 1281 (Temp. Emer. Ct. App. 1982).) The issues before this court, they argue, "are discrete and severable from any ESA/EPAA issues raised by the underlying claims or in the lower court's decision." (*Id.* at 3-4.) A careful review of the case, however, reveals otherwise.

Under the case or controversy requirement of Article III, courts decide cases in the context of a particular dispute and not in a legal vacuum. Thus, notwithstanding the States' careful semantics, we understand the primary question presented in this appeal to be: "Did the district court err in determining that the OHA's decision that Chevron did not receive excess tertiary incentive revenue and

therefore need not make restitution to the Stripper Well escrow fund was unreviewable?"

The district court listed a variety of grounds for dismissing the States' claims, including that the OHA's decision not to enforce the PRO was an unreviewable act of prosecutorial discretion. Under Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), however, the district court need only have announced that it lacked jurisdiction over the matter and dismissed the case. Steel rejected the use of so-called "hypothetical jurisdiction" to reach the merits of a case, and a jurisdictional dismissal is all that is necessary to the holding. As such, we must consider the remainder of the district court's decision dicta. *See* also Gold v. Local 7 United Food and Commercial Workers Union, 159 F.3d 1307, 1310 (10th Cir. 1998) (noting Steel requires that jurisdictional issues must be resolved first).

Nevertheless, determining whether the OHA's decision in this case is properly reviewable would require this court to consider issues arising both under the ESA and EPAA directly and under the FSA. The district court based its ruling that the decision was not reviewable on Consolidated Edison Co. v. O'Leary, 131 F.3d 1475 (Fed. Cir. 1997), and the States ask us to reject this authority. (*See* States' 99-3065 Br. at 27-29.) However, even a brief glance at that case reveals that the Federal Circuit relied heavily on interpretation of ESA/EPAA issues to reach its result. *See* O'Leary, 131 F.3d at 1478 ("Four statutes are pertinent to this issue: sections 209, 210, and 211 of the ESA, which were incorporated into the EPAA, and section 503 of the Department of Energy Organization Act (DOEOA)."). The States would have us focus only on whether the DOEOA precludes review of the OHA's decision, but it is clear that the case relied upon by the district court to dismiss the States' claims directly involved the ESA and EPAA. As such, this claim clearly arises under those statutes.

Moreover, we would have to determine what effect paragraph IV.A.2 of the FSA should have on our characterization of the OHA's decision. That paragraph reads:

> Future DOE Actions. With the sole exception set forth in II.A.4, nothing in this Agreement shall be read or construed to limit or render reviewable the exercise of DOE's prosecutorial discretion in determining the appropriate action to take, if any, with regard to any enforcement matter. Further, nothing in this Agreement shall be read or construed to impose any obligation or duty upon the DOE regarding the enforcement or non-enforcement of its regulations, and it remains solely in the DOE's discretion to determine whether an enforcement proceeding should be initiated, settled, pursued on particular terms or terminated.

We are at a loss to see how the issue presented to this court could be decided without reference to this highly probative provision of the agreement underlying this dispute. (*See* also FSA ¶ VI.B ("[The FSA] shall not create any right of action against DOE concerning the initiation, continuation or conduct of any litigation.").)

Furthermore, Appellee Chevron relies in part on the FSA to support its assertion that the district court's decision not to review the OHA's action was correct. (*See* Aple. Chevron 99-3065/99-3012 Br. at 35.) It is clear that raising an ESA/EPAA issue (which the FSA clearly is) in a defense is sufficient to invoke the Federal Circuit's exclusive jurisdiction.

This court declines to participate in the fiction that this dispute does not turn squarely on the ESA, the EPAA, and the FSA. In order to grant the relief sought by the States, we would have to conduct inquiries specifically committed to the expertise of the Federal Circuit. Specifically, we would have to reject a Federal Circuit decision explicitly resting on those statutes, interpret and

distinguish a paragraph of the FSA directly on point, and consider a defense implicating the FSA.[3]

The States also contend that the district court erroneously excluded certain arguments advanced in the States' reply brief before that court and that the district court "should have considered all of the States' claims together in the MDL 378 docket." While these claims do not directly turn on an interpretation or application of the FSA, the Federal Circuit nevertheless has exclusive jurisdiction to resolve them. In Phoenix Petroleum Co. v. United States Fed'l Energy Regulatory Comm'n, 95 F.3d 1555 (Fed. Cir. 1996), the Federal Circuit explained that TECA's exclusive jurisdiction extended to issues that did not themselves arise under the EPAA when "a meaningful ruling requires consideration of the issues as a whole, the construction of the EPAA will control the litigation, the issues are so commingled as to render separate treatment impractical, or the non-EPAA issues are subsidiary, preliminary or threshold to an EPAA issue."

Id. at 1563 (quoting Pennzoil Exploration & Prod. Co. v. Lujan, 928 F.2d 1139, 1141 (Temp. Emer. Ct. App. 1991). We hold that the same is true when issues not otherwise relating to the FSA are so inextricably linked and subsidiary to the FSA claim that it would be both impractical
and wasteful to consider those claims separately.

In the present case, whether the district court properly excluded some of the States' arguments and whether the district court properly refused to consider certain claims under its MDL 378 docket are surely subsidiary to the States' primary FSA claims. As we have explained at length above, it is clear that these appeals are

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[3]The States also alleged that "the court's conclusion that OHA was exercising unreviewable prosecutorial discretion (a) precluded it from addressing the merits and (b) fatally infected its review of the merits." Because we have found that this court lacks jurisdiction to review the district court's primary determination, we likewise cannot consider these subsidiary claims.

fundamentally based on the FSA, and it would merely waste the courts' and the litigants' resources to remove these secondary issues from their proper context. Indeed, the States rightly acknowledge that the "central issue" is their claim that the district court should have reviewed the OHA decision. Furthermore, we note that because the additional claims the States sought to raise were themselves based on the FSA, whether the district court properly excluded these claims is merely a threshold inquiry to an FSA claim. Thus, it appears that the States' claims that do not on their face implicate the FSA in fact are so secondary in relevance and importance to their FSA companions that they must fall within the Federal Circuit's exclusive jurisdiction.

(3) The States' Original Complaint (No. 99-3066)

On the same day the district court dismissed the States' and Jurisdictions' motions to enforce the FSA, it issued a separate order dismissing the States' concurrent original complaint. In that order, the district court held that the States' allegation that DOE had violated the FSA failed to state a claim upon which relief could be granted. The court then dismissed the remainder of the States' claims for lack of standing, or, alternatively, for lack of proper venue. (*See* Order of Dismissal at 2.) The States have appealed these dismissals to this court.

In dismissing the States' FSA claim, the district court explicitly adopted the reasoning of its order dismissing the MDL 378 claims. (*See* Order of Dismissal at 2.) For the same reasons we cannot review the MDL 378 decisions, this court does not have jurisdiction to review the States' claim that the district court erroneously adopted the MDL 378 rulings.

The same result obtains with regard to the district court's dismissals for lack of standing. In its brief, Appellee DOE argues that the States do indeed lack standing under ESA:

The standing issue centers on an interpretation of ESA sections 209-11 and the bases on which Congress authorized public and private actions to enforce the ESA, the EPAA or regulations issued thereunder. An unbroken line of controlling decisions stand [sic] for the proposition that private parties, such as the States, lack standing to seek judicial review of a DOE enforcement decision made under the purview of the ESA, the EPAA or regulations issued thereunder.

As noted above, this court has held that "the TECA's jurisdiction can be created by defenses that raise ESA/EPAA issues." In re Seneca Oil, 906 F.2d at 1454 n.11. Consideration of Appellees' counter arguments on appeal would require this court to interpret statutes that are plainly within the exclusive jurisdiction of the Federal Circuit. Allowing this appeal to proceed would inevitably thwart either the will of Congress in granting exclusive jurisdiction to the Federal Circuit or the Appellees' right to have their defenses heard by the appropriate authority. Thus, Appellants' claims may not be presented to this court.[4]

D. Transfer

28 U.S.C. § 1631 states:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to

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[4]Because we find that the district court's dismissal for lack of standing cannot be reviewed in this court, it is unnecessary to determine whether the court's alternative rationale (lack of venue) was correct.

which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

The plain language of this provision indicates we are required to consider whether transferring these cases to the Federal Circuit would be "in the interest of justice."

We note that the States and the Jurisdictions have previously commenced proceedings in these cases before the Federal Circuit. After filing "protective" notices of appeal in that court, Appellants sought but were denied a stay of those proceedings pending our disposition. Appellants then sought to voluntarily withdraw those appeals, but the Federal Circuit ruled that failure to proceed would result in dismissal with prejudice. The Jurisdictions chose to continue in that court, while the States accepted a dismissal with prejudice. In the order directing the States to proceed with the appeals or face dismissal, the Federal Circuit anticipated that the States might request that this court transfer the actions back to the Federal Circuit:

In light of these circumstances, any dismissal entered in appeal nos. 99-1328 and 99-1356 will be with prejudice. As Chev[r]on and DOE point out, if a dismissal is entered without prejudice, [the States] could, in the event of an adverse ruling by the 10th Circuit, seek to resurrect [their] appeal here by way of transfer. That would be an impermissible result, given our prior rulings and the fact that appeal no. 99-1327 [(the Jurisdictions' appeal)] is proceeding in this court.

In light of this unequivocal declaration by the Federal Circuit that it intended to finally dispose of the States' appeals, and in light of the States' ample opportunity to pursue these cases in the proper

forum, we cannot say that justice would be served by transfer to the Federal Circuit. Accordingly, the States' motion is denied.[5]

CONCLUSION

For the above reasons, we find that all of Appellants' claims raised in these three cases are within the Federal Circuit's exclusive jurisdiction pursuant to 28 U.S.C. § 1295(a). Accordingly, Appellees' motions to dismiss these appeals for lack of appellate jurisdiction are hereby GRANTED, and the States' motions for rehearing and transfer are DENIED.

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[5] The DOE's motion to file its responsive brief on the transfer issue out of time is granted.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN RE: THE DEPARTMENT OF ENERGY
STRIPPER WELL LITIGATION.

THE STATES OF ALABAMA,
CALIFORNIA, CONNECTICUT, IDAHO,
INDIANA, MARYLAND, MICHIGAN,
MISSISSIPPI, MONTANA, OHIO,
SOUTH DAKOTA, VERMONT,
WISCONSIN and WYOMING,

Plaintiffs-Appellants, No. 99-3065

v. (D.C. No. 79-CV-378)

UNITED STATES DEPARTMENT OF ENERGY and CHEVRON U.S.A. INC., (D. Kan.)

Defendants-Appellees

THE STATES OF ALABAMA,
CALIFORNIA, CONNECTICUT, IDAHO,
INDIANA, MARYLAND, MICHIGAN,
MISSISSIPPI, MONTANA, OHIO, No. 99-3066
SOUTH DAKOTA, VERMONT,
WISCONSIN and WYOMING, (D.C. No. 96-CV-1180-MLB)

Plaintiffs - Appellants, (D. Kan.)

v.

UNITED STATES DEPARTMENT OF ENERGY, Hazel O'Leary, Secretary; OFFICE OF HEARINGS AND APPEALS, Department of Energy, George B. Breznay, Director,

Defendants - Appellees,

and

CHEVRON, USA, INC.,

Intervenor-Defendant-Appellee.

DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND and WEST VIRGINIA, THE TERRITORY OF GUAM AND THE VIRGIN ISLANDS,

No. 99-3102

(D.C. No. 97-CV-378)

(D. Kan.)

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF ENERGY, and CHEVRON U.S.A., INC.

Defendants-Appellees.

ORDER AND JUDGMENT(*)

Before **EBEL**, **HOLLOWAY** and **KELLY**, Circuit Judges.

Plaintiffs-Appellants challenged a decision by the Department of Energy; the District of Kansas denied their claims, and they now seek review in this court. Defendants-Appellees have moved this court to dismiss these appeals for lack of appellate jurisdiction, and Appellants have opposed these motions. We find that the Federal Circuit has exclusive jurisdiction over these claims pursuant to 28 U.S.C. § 1295(a)(11)-(12), and Appellees' motions to dismiss cases 99-3065, 99-3102, and 99-3066 are therefore GRANTED.

BACKGROUND

Plaintiffs-Appellants in cases 99-3065 and 99-3066 are the states of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin, and Wyoming (the "States"). Plaintiffs-Appellants in case 99-3102 are the states of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Rhode Island, and West Virginia, as well as the territories of Guam and the Virgin Islands (the "Jurisdictions;" the States and the Jurisdictions are collectively referred to as "Appellants").

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appellants sued Defendants-Appellees United States Department of Energy ("DOE") and Chevron U.S.A. Inc. ("Chevron;" DOE and Chevron are collectively referred to as "Appellees") in connection with a settlement agreement purporting to resolve the Stripper Well Litigation.[1] That litigation concerned the proper disbursement of over $1 billion in overcharge funds collected by DOE pursuant to crude oil price controls imposed under the Economic Stabilization Act of 1970 ("ESA") and the Emergency Petroleum Allocation Act of 1973 ("EPAA"). In 1986, a multitude of interested parties, including the States and the Jurisdictions, entered into the Final Settlement Agreement ("FSA"), which apportioned these and subsequently recovered funds among DOE (40%), the fifty states and several territories (40%), and reserved the remainder to settle individual claims (primarily those of utilities and oil refineries). The FSA was approved by Judge Theis of the

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[1] The present controversy between Appellants and Appellees took the form of three separate lawsuits. First, the States filed a motion to enforce the agreement in the District of Kansas, which was responsible for approving and overseeing the agreement under its Multi-District Litigation 378 ("MDL 378") docket. That is now case No. 99-3065 before this court. Second, the States filed an original complaint in the same district court, docket No. 96-CV-1180, which is now case No. 99-3066 before this court. Third, the Jurisdictions filed a separate motion to enforce the agreement under the MDL 378 docket, advancing a different theory than the States. That is now case No. 99-3102 before this court. All of these cases concern the same disputed DOE decision. We consolidated cases 99-3065 and 99-3102, and companioned 99-3066 for oral argument. This Order addresses the Appellees' Motions to Dismiss for Lack of Appellate Jurisdiction filed in each case.

District of Kansas, pursuant to that court's MDL 378 jurisdiction. Although intended to end this controversy, the FSA has itself been the subject of extended litigation.

At the center of the present case is a decision by the Department of Energy not to seek from Chevron some $500 million, which Appellants maintain should then be disbursed under the FSA. In 1992, DOE's Economic Regulatory Administration ("ERA") issued a Proposed Remedial Order ("PRO") alleging that Chevron had improperly represented its status under the now-defunct Tertiary Incentive Program ("TIP"),[2] and that it therefore must disgorge $124,989,588 it had received under the program (with interest, the sum exceeds $500 million). Chevron challenged the PRO and the matter was referred to DOE's Office of Hearings and Appeals ("OHA").

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[2] The TIP was a DOE program designed to increase domestic oil production and thus reduce the country's dependence on foreign oil. Under TIP, companies that extracted oil using more difficult and costly "tertiary" methods were allowed to sell that oil at full market value, instead of at the government-imposed price, in order to recoup the additional expense. Because some refiners had greater access to price-controlled oil than others (who were forced to pay full market value), DOE also implemented the Entitlements Program, which required that refiners with such greater access purchase "entitlements" from other refiners. The price of the entitlements corresponded with the difference between the market and controlled prices, the goal being to avoid penalizing refiners buying TIP oil at full price. DOE issued an annual Entitlements Notice, detailing which refiners were over or under their allotted entitlements and requiring settlement of these accounts.

The OHA, however, declined to enforce the PRO as a final Remedial Order, finding that "the ERA has failed to establish[] that Chevron was in fact unjustly enriched by its participation in the TIP as alleged in the PRO." (OHA Decision at 12-13.) As a result, none of the Appellants received additional disbursements under the FSA. After the OHA issued its decision in 1996, a group of private parties, who stood to recover additional funds as individual claimants under the FSA, directly challenged the ruling in the District of Columbia District Court. That claim, however, was twice rejected by the Federal Circuit. See Consolidated Edison v. O'Leary, 117 F.3d 538 (Fed. Cir. 1997) (dismissing plaintiffs' claims for lack of a private right of action and because the OHA's decision was not justiciable), Consolidated Edison v. O'Leary, 131 F.3d 1475 (Fed. Cir. 1997) (dismissing plaintiffs' claim because the OHA's decision was not reviewable).

In 1996, the States and Jurisdictions brought the present actions in the District of Kansas, challenging the same OHA decision. That court, however, dismissed all three suits. In its order denying both the States' and the Jurisdictions' motions to enforce the FSA (Nos. 99-3065 & 99-3102 before this court), the district court identified several reasons why these actions were improper. First addressing the States' claims, it found that one provision of the FSA upon which the States relied "does not provide any substantive rights." (Order at 11.) It further noted that "[t]he FSA settled the stripper well litigation, along with the entitlements litigation, but it did not place OHA and its enforcement proceedings under this court's oversight." (Id.) The court then turned to the second FSA provision that the States claimed DOE's decision violated, but found that no such violation in fact occurred. (See id. at 12-13.) Citing the Federal Circuit's recent decisions regarding this controversy, the court found that "OHA's dismissal of the proposed remedial order against Chevron was a part of DOE's prosecutorial function and

as such, was unreviewable." (Id. at 13.) "Finally," the court continued, "paragraph IV.A.2 of the FSA specifically preserves DOE's prosecutorial discretion and shields it from review." (Id.)

Discussing the Jurisdictions' claims, the court similarly engaged in an analysis of the FSA. The Jurisdictions alleged that Chevron "'fraudulently misled' the court and the parties [to the FSA] by misrepresenting its status as an entitlements seller under the draft 1981 Entitlements Notice [upon which the FSA distributions were based.]" (Id. at 4.) Specifically, the Jurisdictions argued that when Chevron claimed certain tax credits after DOE discontinued the Entitlements Program, it automatically decertified itself as an entitlements seller under the TIP. (See id.) The court responded, however, that "[t]he jurisdictions assume that, in 1983, Chevron had to elect between a windfall profit tax refund and remaining on the entitlements list. There is nothing in the FSA requiring such an election." (Id. at 15.) The court further found that "tax matters were excepted from the settlement by Proviso (E) to the Refiners Release," and that "the FSA imposed no obligation on Chevron as a settling refiner to disclose its pending windfall profit tax refund claim." (Id. at 16.) Thus, its denial of the Jurisdictions' motion required a close inquiry into the terms of the FSA.

That same day, the district court issued a separate order dismissing the States' original complaint (No. 99-3066 before this court). The court specifically incorporated its findings in the MDL order, and dismissed the States' FSA claims on those grounds. (See Order of Dismissal at 2.) The States had also challenged DOE's interpretation of the TIP regulations, DOE's legal authority to issue or amend its regulations, and DOE's compliance with the Administrative Procedure Act and the Department of Energy Organization Act. The court dismissed

these claims for lack of standing or, alternatively, for lack of proper venue. (See id. at 1-4.)

The States and Jurisdictions now seek review in this court. Appellees DOE and Chevron filed motions to dismiss for lack of appellate jurisdiction in each case, alleging that exclusive appellate jurisdiction over these claims lies with the Federal Circuit. For the reasons stated below, we agree.

A. Federal Circuit Jurisdiction

28 U.S.C. § 1295(a) provides that "[t]he United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal . . . (11) under section 211 of the Economic Stabilization Act of 1970; (12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973." Among the relevant provisions of the ESA and the EPAA were the crude oil price controls, which formed the basis for the controversy resolved by the FSA. The Federal Circuit succeeded to this jurisdiction upon abolition of the Temporary Emergency Court of Appeals ("TECA") in 1993. See Pub. L. 102-572 § 102(d), (e) (1992). Thus, this court cannot exercise jurisdiction over appeals "under" these statutes.

B. Tenth Circuit Authority

The Tenth Circuit has carefully avoided encroaching on the exclusive jurisdiction of the Federal Circuit and its predecessor, TECA. In Mobil Oil Corp. v. United States Dep't of Energy, 983 F.2d 172 (10th Cir. 1992), this court found that a dispute over moneys claimed by DOE in restitution proceedings against an oil company implicated the ESA and EPAA and was therefore subject to TECA's exclusive jurisdiction. See id. at 175-76. The court found that the issue of liability for restitution was "intertwined with the ESA and EPAA," and therefore could

not properly be removed from TECA's domain. Id. at 176. The court also noted that "[a]nother Tenth Circuit decision recognizes TECA's jurisdiction when interpretation of price ceilings regulations imposed by the ESA and EPAA cause a contract dispute between the parties." Id. (citing Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979). The Tenth Circuit has never exercised jurisdiction over a dispute concerning the FSA.

Appellants argue that our decision in In re Seneca Oil, 906 F.2d 1445 (10th Cir. 1990), points in favor of jurisdiction over the present case. This argument is incorrect. In Seneca Oil, the court held that where ESA/EPAA issues are merely a backdrop to an independent claim, jurisdiction may obtain. "This appeal," the court wrote "is not from an action to enforce DOE regulations or to obtain an order of restitution; rather it is from a decision regarding the priority of the restitution claim in bankruptcy." Id. at 1454. Moreover, the court was careful to note that TECA's exclusive jurisdiction with respect to the ESA and EPAA is not to be narrowly construed: "Thus, the phrase 'arising under' is interpreted more expansively for purposes of TECA's jurisdiction than it is for purposes of the federal question jurisdiction of the district courts. For example, unlike federal question jurisdiction, the TECA's jurisdiction can be created by defenses that raise ESA/EPAA issues." Id. at 1454 n.1 (emphasis added). In sum, only where these statutes and their regulations are mere background will this court exercise jurisdiction.

The question remains, therefore, whether appeals relating to the FSA arise under the ESA and EPAA, or whether those statutes merely provide a backdrop for independent claims. In the absence of Tenth Circuit precedent speaking directly to this issue, we find it useful to seek guidance from the Federal Circuit's extensive dealings with the FSA. As a preliminary

matter, we note that the Federal Circuit expressly held "that the TECA precedent and practice on jurisdictional matters shall continue to apply to cases that reach the Federal Circuit by virtue of succession to the TECA." Texas American Oil Corp. v. United States Department of Energy, 44 F.3d 1557, 1564 (Fed. Cir. 1995). Accordingly, we look to both Federal Circuit and TECA authority in making this inquiry.

Such a review reveals that appellate jurisdiction over FSA disputes is exclusively vested in the Federal Circuit. In In re Dep't of Energy Stripper Well Exemption Litigation, 864 F.2d 796 (Temp. Emer. Ct. App. 1988), the court held that "seeking interpretation of the Final Settlement Agreement to resolve a dispute between two signatories to that Agreement, [is] a cause of action arising out of federal law, specifically out of the laws and regulations concerning the Economic Stabilization Act." Id. at 799. Given the plain logic of this conclusion, as well as the experience and expertise of the Federal Circuit in interpreting the FSA, we hold that if a controversy requires interpretation of the FSA, 28 U.S.C. § 1295(a)(11) grants exclusive appellate jurisdiction to the Federal Circuit.

C. Nature of the Present Case

(1) The Jurisdictions' MDL 378 Case (No. 99-3102)

In their opposition to Appellees' motion to dismiss, the Jurisdictions admit that "[t]he Jurisdictions' claims are all based on enforcing the FSA." (Jurisdictions' Opposition at 3.) As we have previously stated, claims under the FSA are within the exclusive jurisdiction of the Federal Circuit and thus cannot be considered by this court. The Jurisdictions cite several TECA and Federal Circuit cases for the proposition that FSA claims do not arise under the ESA or EPAA. (See Jurisdictions' Opposition at 3-4.) None of these cases, however, directly

addresses this point; moreover, the Jurisdictions fail to discuss TECA's 1988 In re Stripper Well case explicitly finding that FSA claims do indeed arise under those statutes. Thus, because the Jurisdictions' claims are based on the FSA, the Federal Circuit has exclusive jurisdiction.

(2) The States' MDL 378 Case (No. 99-3065)

In their brief, the States have carefully phrased the issues presented to this court to avoid any mention of the FSA. They ask this court: "Did the lower court err in ruling that the 1977 Department of Energy Organization Act ("DOEOA") requires the challenged order of the Department of Energy's Office of Hearings and Appeals to be deemed an unreviewable act of prosecutorial discretion?" Moreover, they urge that in evaluating jurisdiction we must "'look at the nature of the issue presented to us and not to the nature of the case or controversy presented below.'" (States 99-3065 Opposition at 2 (quoting MGPC, Inc. v. DOE, 673 F.2d 1277, 1281 (Temp. Emer. Ct. App. 1982).) The issues before this court, they argue, "are discrete and severable from any ESA/EPAA issues raised by the underlying claims or in the lower court's decision." (Id. at 3-4.) A careful review of the case, however, r eveals otherwise.

Under the case or controversy requirement of Article III, courts decide cases in the context of a particular dispute and not in a legal vacuum. Thus, notwithstanding the States' careful semantics, we understand the primary question presented in this appeal to be: Did the district court err in determining that the OHA's decision that Chevron did not receive excess tertiary incentive revenue and therefore need not make restitution to the Stripper Well escrow fund was unreviewable? In order to determine whether the district court erred, we must first evaluate the reasoning it offered in support of its decision. Even a cursory review of the district court's Memorandum and Order

indicates that interpretation of the FSA was integral to its decisionmaking process, and appellate review is therefore committed exclusively to the Federal Circuit.

First, we note that before declining to review the OHA's decision, the district court determined whether a certain provision of the FSA conferred a substantive right upon the plaintiffs. (See Order at 11.) Finding that it did not, the court went on to analyze a second provision pertaining to the States' claims, also finding that "DOE did not violate this provision." (Id. at 12.) Only after determining that other substantive rights under the FSA were not infringed did the court examine whether the OHA decision was unreviewable as prosecutorial discretion. In order for this court to determine whether the district court erred in finding that parties to the FSA cannot challenge such an OHA decision, we would likewise have to consider the impact of the FSA on this situation. The States were before the district court on its MDL 378 docket precisely because they are parties to the FSA, and it was in this context that the district court reached its decision. This court cannot don judicial blinders and evaluate merely one part of the district court's reasoning it offered in finding the OHA decision unreviewable. In short, the States ask us not to *review* the district court's decision, but simply to *reverse* it. This court cannot so abdicate its core appellate function.

Even were we to accept the States' invitation to decide merely whether the district court erred in finding an OHA decision unreviewable, such an examination would require interpretation of the FSA and thus infringe upon the Federal Circuit's exclusive jurisdiction over such matters. In support of its finding that "there is no right for the Secretary of Energy or any other person to appeal OHA's decision not to issue a remedial order," the court noted that "paragraph IV.A.2 of the FSA specifically preserves DOE's prosecutorial discretion and shields it from

review." (Id. at 13.) It would be impossible for this court to discern whether the district court erred without evaluating the reasoning on which its decision was based.

This court declines to participate in the fiction that this dispute does not turn squarely on the FSA. As the district court's order clearly indicates, the holding that the OHA's decision is unreviewable rested in large part on the provisions of the FSA, and it is beyond this court's jurisdiction to consider such matters. Accordingly, this claim may only be presented to the Federal Circuit.[3]

The States also contend that the district court erroneously excluded certain arguments advanced in the States' reply brief before that court and that the district court "should have considered all of the States' claims together in the MDL 378 docket." (Aplt. Br. 99-3065 at 38, 43.) While these claims do not directly turn on an interpretation or application of the FSA, the Federal Circuit nevertheless has exclusive jurisdiction to resolve them. In Phoenix Petroleum Co. v. United States Fed'l Energy Regulatory Comm'n, 95 F.3d 1555 (Fed. Cir. 1996), the Federal Circuit explained that TECA's exclusive jurisdiction extended to issues that did not themselves arise under the EPAA when "a meaningful ruling requires consideration of the issues as a whole, the construction of the EPAA will control the litigation, the issues are so commingled as to render separate

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[3] The States also alleged that "the court's conclusion that OHA was exercising unreviewable prosecutorial discretion (a) precluded it from addressing the merits and (b) fatally infected its review of the merits." (Aplt. Br. 99-3065 at 33.) Because we have found that this court lacks jurisdiction to review the district court's primary determination, we likewise cannot consider these subsidiary claims.

treatment impractical, or the non-EPAA issues are subsidiary, preliminary or threshold to an EPAA issue."

Id. at 1563 (quoting Pennzoil Exploration & Prod. Co. v. Lujan, 928 F.2d 1139, 1141 (Temp. Emer. Ct. App. 1991). We hold that the same is true when issues not otherwise relating to the FSA are so inextricably linked and subsidiary to the FSA claim that it would be both impractical and wasteful to consider those claims separately.

In the present case, whether the district court properly excluded some of the States' arguments and whether the district court properly refused to consider certain claims under its MDL 378 docket are surely subsidiary to the States' primary FSA claims. As we have explained at length above, it is clear that these appeals are fundamentally based on the FSA, and it would merely waste the courts' and the litigants' resources to remove these secondary issues from their proper context. Indeed, the States rightly acknowledge that the "central issue" is their claim that the district court should have reviewed the OHA decision. (See States' Opposition 99-3065 at 4.) Furthermore, we note that because the additional claims the States sought to raise were themselves based on the FSA, whether the district court properly excluded these claims is merely a threshold inquiry to an FSA claim. Thus, it appears that the States' claims that do not on their face implicate the FSA in fact are so secondary in relevance and importance to their FSA companions that they must fall within the Federal Circuit's exclusive jurisdiction.

(3) The States' Original Complaint (No. 99-3066)

On the same day the district court dismissed the States' and Jurisdictions' motions to enforce the FSA, it issued a separate order dismissing the States' concurrent original complaint. In that order, the district court held that the States' allegation that

DOE had violated the FSA failed to state a claim upon which relief could be granted. The court then dismissed the remainder of the States' claims for lack of standing, or, alternatively, for lack of proper venue. (See Order of Dismissal at 2.) The States have appealed these dismissals to this court.

In dismissing the States' FSA claim, the district court explicitly adopted the reasoning of its order dismissing the MDL 378 claims. (See Order of Dismissal at 2.) For the same reasons we cannot review the MDL 378 decisions, this court does not have jurisdiction to review the States' claim that the district court erroneously adopted the MDL 378 rulings.

The same result obtains with regard to the district court's dismissals for lack of standing. In it brief, Appellee DOE argues that the States do indeed lack standing under ESA:

The standing issue centers on an interpretation of ESA sections 209-11 and the bases on which Congress authorized public and private actions to enforce the ESA, the EPAA or regulations issued thereunder. An unbroken line of controlling decisions stand [sic] for the proposition that private parties, such as the States, lack standing to seek judicial review of a DOE enforcement decision made under the purview of the ESA, the EPAA or regulations issued thereunder.

(DOE Br. 99-3066 at 10.) As noted above, this court has held that "the TECA's jurisdiction can be created by defenses that raise ESA/EPAA issues." In re Seneca Oil, 906 F.2d at 1454 n.11. Consideration of Appellees' counter arguments on appeal would require this court to interpret statutes that are plainly within the exclusive jurisdiction of the Federal Circuit. Allowing this appeal to proceed would inevitably thwart either the will of Congress in granting exclusive jurisdiction to the Federal Circuit or the Appellees' right to have their defenses heard by the

appropriate authority. Thus, Appellants' claims may not be presented to this court.[4]

CONCLUSION

For the above reasons, we find that all of Appellants' claims raised in these three cases are within the Federal Circuit's exclusive jurisdiction pursuant to 28 U.S.C. § 1295(a). Accordingly, Appellees' motions to dismiss these appeals for lack of appellate jurisdiction are hereby GRANTED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

David M. Ebel
Circuit Judge

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[4] Because we find that the district court's dismissal for lack of standing cannot be reviewed in this court, it is unnecessary to determine whether the court's alternative rationale (lack of venue) was correct.

[Filed January 21, 1999]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

IN RE: THE DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION	M.D.L. 378

MEMORANDUM AND ORDER

Before the court are: (1) motion of the states[1] to enforce the Department of energy's obligations under the Final Settlement Agreement (Doc. 2264); and (2) motion of the jurisdictions[2] to enforce the Final Settlement Agreement against Chevron U.S.A. Inc. and the Department of Energy (Doc. 2274). A hearing on the motions was held on May 7, 1997 before the Honorable Frank G. Theis. Following oral argument, the court took the matters under advisement. Supplemental briefs were filed, and the matter was not fully briefed at the time of Judge Theis's death. The cases were subsequently transferred to the undersigned judge. The court has carefully considered the voluminous briefs and the transcript of the

[1]This motion is brought by the states of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin and Wyoming.

[2]This motion is brought by the states of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Rhode Island and West Virginia, and the Territory of Guam and the Virgin Islands.

hearing. For the reasons stated herein, the motions to enforce in M.D.L. 378 shall be denied.

Background

The lengthy history of this case is well known to the parties and will not be recounted here. Judge Theis's decision approving the M.D.L. 378 final Settlement Agreement (FSA) of the litigation is found at 653 F. Supp. 108 (1986) and may be consulted by anyone unfamiliar with the case. Judge Theis entered several subsequent orders, none of which are material to the issues presented by the motions.

When Judge Theis heard oral argument on the motions, he made the following observations which give some perspective to the scope and complexity of this litigation:

> As of February of 1996, 2,263 pleadings have been filed in this case. This Court has entered 77 opinions and orders resulting in dozens of published opinions. This Court entered 579 other orders, while 23 orders have been signed by other judges in this district as a matter of courtesy. A total of 24 appeals have been filed, and as of February of 1996, 12 mandates have been issued from TECA affirming substantially all of the Court's rulings. 10 appeals have been dismissed by the 10th Circuit Court of Appeals primarily on jurisdictional grounds. There are 2 appeals that remain pending in the United States Court of Appeals for the federal circuit, and those have not dissipated, they have either been resolved or they are in the process of being resolved. In addition to the 6-day trial conducted in 1981, a total of 36 additional hearings have been conducted on the record.

(Doc. 2327 at 5-6.)

Hopefully, this order will be the final chapter in this protracted case.

Claims of the States

In their motion and supporting memorandum, the states make two arguments based on the FSA. They argue that the Department of Energy (DOE) violated is undertaking in the FSA to "fully support the procedures and policies set forth herein in all present and future proceedings involving Alleged Crude Oil Violations." FSA ¶ VI.B. (Doc. 2264 at 16-19). Additionally, the states argue that by allowing Chevron to offset its restitutionary obligations under the TIP program based on Chevron's entitlements claims, DOE's office of Hearings and Appeals' (OHA) decision violated DOE's commitment in the FSA not to grant any benefits arising out of entitlements claims based on crude oil sales after December 31, 1980. FSA ¶ V.F. (Doc. 2264 at 19-20). Pertinent aspects of the TIP program and the OHA decision are summarized, infra.

The states request the court to vacate OHA's decision and to remand with directions (1) to conduct the proceedings in accordance with the provisions of the FSA, along with instructions that DOE not consider any entitlements benefits to Chevron arising out of the unissued January 1981 Entitlements Notice or arising out of post-December 31, 1980 crude oil transfers and (2) to conduct the proceedings in accordance with the regulatory definition of tertiary incentive revenue, without regard to the receipt or lack of receipt of entitlements benefits in connection with the refining of TIP-certified oil. (Doc. 2264 at 26-27).

The states make several arguments which are not based upon the FSA. The states argue OHA's decision violates DOE's TIP regulations; constitutes the promulgation or amendment of regulations after DOE's authority to do so has expired; violates the Administrative Procedure Act; violates the Department of Energy Organization Act; and is beyond the powers of OHA. The court has no demonstrated jurisdiction to decide these non-FSA claims. Its jurisdiction is limited to enforcement of the terms of the FSA. In re Department of Energy Stripper Well Exemption Litigation,

864 F.2d 796, 800 (Temp. Emer. Ct. App. 1988).[3] Cf. Consolidated Edison Company of new York, Inc. v. O'Leary, 117 F.3d 538, 545 (Fed. Cir. 19997), cert. denied, 118 S. Ct. 1036 (1998).

Claims of the Jurisdictions

The jurisdictions make two arguments based on the FSA. They contend that Chevron "fraudulently misled" the court and the parties by misrepresenting its status as an entitlements seller under the draft January 1981 Entitlements Notice. They claim that this allegedly fraudulent misrepresentation allowed Chevron to share in the $257-plus million distributed among refineries under the FSA. 653 F. Supp. at 112. The jurisdictions also contend that the federal government should forfeit its right to funds because DOE failed to uphold the FSA and failed to discharge is enforcement responsibility against Chevron by reporting Chevron's allegedly fraudulent conduct to this court. (Doc. 2274 at 6 and Doc. 2295 at 13-14).

The jurisdictions ask the court to require Chevron to disgorge $61,665,472, plus interest, the amount Chevron received pursuant to the FSA, and to deposit that sum into the court's escrow account. The jurisdictions argue that because DOE has failed to fulfill its obligations to "fully support the procedures and policies set forth herein in all present and future proceedings

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[3]The states also raise several new arguments in a reply brief. one of the new claims is that Chevron's attempt to offset its TIP obligations on the basis of an entitlements claim is barred by paragraph R to the Refiners Release, FSA, Settlement Exh. A, Attachment A, 2nd proviso, para. R. The states also take issue with OHA's computation methodology. The court declines to address these complex issues raised for the first time in the reply, since DOE and Chevron did not have an opportunity to respond to those arguments. Martin v. State of Kansas, 996 F. Supp. 1282, 1296 (D. Kan. 1998); Thurston v. Page, 931 F. Supp. 765, 768 (D. Kan. 1996). The efficacy of the rule is well demonstrated by this case. The states have had several years to formulate their positions. There is no excuse for the states to wait to raise these arguments in a reply brief.

involving Alleged Crude Oil Violations . . .," FSA ¶ VI.B, the federal government should not be allowed to share in the funds. (Doc. 2274 at 13-14).

The TIP Program

In July 1978, DOE promulgated the TIP program to encourage the use of risky and more expensive tertiary recovery methods in the production of domestic crude oil. The regulations allowed ka producer to sell at market prices the oil recovered through a tertiary recovery project, thus avoiding the price controls hen in effect. The regulations gave producers an additional incentive -- producers were allowed to charge market prices on oil that was being produced before the TIP project was in place, allowing the producer "front-end" money to recoup the expenses of the tertiary project, regardless of the success of the tertiary project. OHA Decision, p. 2.

Beginning January 1, 1980, under the TIP, a producer could self-certify a qualified tertiary project to the Economic Regulatory Administration (ERA) and first sales of crude oil were not subject to ceiling prices, providing the tertiary incentive revenue from the sales did not exceed the recoupable allowed expenses attributable to that producer. "Tertiary incentive revenue" meant in the case of first sales of crude oil the difference between the market-clearing price and the otherwise applicable ceiling price, less an *ad valorem* severance or windfall profit tax attributable to the excess. 10 C.F.R. 212.78(a)(2). "Recoupable allowed expenses" were those "allowed expenses" that had been reported. "Allowed expenses" were 75% of certain specified expenses, not to exceed $20 million per property. Producers were also allowed to recover "prepaid expenses" for goods and services to be delivered in the future in connection with a tertiary incentive project. The producer was required to file certain reports as a condition of participating in the TIP. OHA Decision, pp. 2-3.

The DOE Entitlements Program

Interrelated with the TIP was the DOE Entitlements

Program, 10 C.F.R. 211.67. The Entitlements Program was established in 1974 to equalize the benefits of access to lower priced domestic crude oil among domestic refiners. Under the Entitlements Program, a refiner was required to have one "entitlement" for each barrel of "deemed old oil" that it refined. The price of an entitlement was roughly the difference between the price of controlled and uncontrolled crude oil. If the number of entitlements issued to a refiner for a month was less than its adjusted receipts of deemed old oil (defined in 10 C.F.R. 211.62), the refiner was required to purchase entitlements from other refiners, a situation which was disadvantageous to a refiner like Chevron. If the number of entitlements issued was greater than its adjusted deemed old oil receipts, the refiner received benefits through the sale of entitlements to other refiners. DOE set the price of the entitlements and assigned the obligations to buy or sell through a list (the Entitlements Notice) published during the second month after the transactions on which the computations were based. OHA Decision, pp. 16-176.

In February 1981, following the termination of price controls on January 28, 1981, the DOE issued the December 1980 Entitlements Notice. The DOE also issued a draft January 1981 Entitlements Notice which later became important in the settlement of the Striper Well Litigation. However, the DOE never issued a final Entitlements Notice for January 1981. OHA Decision, pp. 3-4 and FSA para. V.

The Proposed Remedial Order (PRO)

In the PRO, ERA charged Chevron with receiving TIP revenues substantially in excess of those to which it was entitled. OHA Decision, p. 4. According to the PRO, the excessive revenue resulted from windfall profit and severance tax refunds and other monies received by Chevron between December 1983 and 1990. The ERA contended that Chevron should make restitution of almost $125 million, plus interest. Id. at 8. Chevron, as might be expected, objected to ERA's position. If the PRO had been issued as a final order, the 50 States and 6 Territories and Possession of

the United States would have been entitled to 40% of all restitutionary funds collected form Chevron. Each of the 23 states and 2 territories presently before the court would recover its share of that 40% pursuant to the percentages set forth in the FSA.

OHA scheduled a hearing, with the primary question being whether Chevron actually received approximately $205 million in tertiary incentive revenue as a result of its 1981 TIP certifications. This dollar figure represented the incremental value of the crude oil attributable to Chevron's TIP certifications, i.e., the difference between the value of the crude oil if it had been sold at the regulatory controlled price and the value of the crude oil if sold at the unregulated market price authorized by the TIP. Chevron claimed, inter alia, that it never actually received this amount in "real money" since it sold most of its crude oil production to its own refiners. Chevron contended that it was prevented from benefitting from the TIP certifications as a result of the termination of other Entitlements Program. OHA Decision, pp. 9-10.

One effect of Chevron's TIP certification was an immediate tax liability -- windfall profit taxes were payable to the Internal Revenue Service (IRS) and severance taxes to the relevant states. Chevron paid some $178 million in gross windfall profit tax on the incremental value of the oil. In December 1983, Chevron claimed a refund of some $84 million from the IRS (by taking a credit against windfall profit taxes due in December 1983 and early 1984), claiming that is 1981 recertification[4] was a mere bookkeeping matters, since it had not received any economic benefit. In 1990, the IRS matter was settled, with Chevron retaining the refund for which it had taken credit in 1983 and paying some $15.9 million to IRS to settle the claim.

The OHA Decision

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[4]This term is used several times in the OHA Decision. See, e.g., pp. 21-24, 28, 30-31 and 36-39. The court cannot find a specific definition of the term.

According to OHA, the issue for the evidentiary hearing was "whether as a result of its participation in the TIP, Chevron was unjustly enriched by receipt of excessive TIP revenue in violation of the TIP regulations, and therefore should be required to make restitution in the amount of such unjust enrichment." OHA ultimately concluded "that the ERA has failed to established [sic] that Chevron was in fact unjustly enriched by its participation in the TIP IAs alleged in the PRO and, accordingly, the PRO should be dismissed." OHA Decision, pp. 12-13.

The bulk of the OHA decision is devoted to a discussion of the evidence regarding whether Chevron actually received excess tertiary revenue. OHA considered two questions: (1) how much, if any, did Chevron actually receive in money or other valuable benefit as a result of its 1981 TIP certifications; and (2) whether Chevron should be held liable for its 1981 TIP certifications under some alternative theory of restitution, irrespective of its actual receipt of money. OHA Decision, p. 16.

The decision discusses at length the evidence and conclusions relative to Chevron's actually 1981 TIP revenue. Chevron asserted it did not actually receive tertiary incentive revenue, since it delivered virtually all of the crude to its own refineries and sold less than 1.4% of the tertiary crude to third parties. Instead, Chevron argued that its TIP certifications of uncontrolled tertiary oil resulted in a benefit by reducing the number of entitlements it was required to purchase under the applicable Entitlements Notice. Chevron contended that, by virtue of its more favorable entitlements position resulting form its 1981 TIP certifications, it would have been a seller of entitlements in the amount of $114.3 million, had the January 1981 Entitlements Notice been issued. The termination of price controls intervened, and the January 1981 Entitlements Notice was never issued. OHA Decision, pp. 17-18.

The draft January 9181 Entitlements Notice was used as a basis for dividing the Refiners Escrow in the Stripper Well Litigation. Chevron's position on the draft January 1981

Entitlements Notice was the basis for Chevron receiving $61,665,472 under the FSA in the Stripper Well Litigation. OHA counted that figure as being "tertiary incentive revenue" for purposes of its proceeding. OHA Decision, p. 24. The OHA determined the FSA settlement amount should be counted as tertiary incentive revenue for Chevron because Chevron "would not have received this amount but for its enhanced entitlements position resulting from the TIP recertifications." OHA Decision, p. 24. Nevertheless, the OHA concluded that the evidence had failed to show that Chevron received excess tertiary incentive revenue as the result of its participation in TIP. It found that while Chevron may have violated the letter of the TIP regulations with regard to certification of TIP crude oil, it never violated the substance of the regulations because it did not receive an excess amount of actual revenue. OHA therefore dismissed the PRO. OHA Decision, p. 39.

Discussion of the Statess' FSA Claims

The states contend that OHA's decision violates DOE's duty under paragraph VI.B of the FSA. That paragraph provides:

> Support of Agreement. The Parties to this Agreement shall support approval of all of its provisions, shall take all steps and make all filings necessary to its implementation at their own expense or from their respective Escrow funds. DOE will undertake the defense of this Agreement in response to any litigation, in which DOE is named as a party, challenging this Agreement or any action required to be taken by DOE pursuant thereto. However, DOE's agreement to this provision doe not circumscribe the discretion of the Attorney General to authorize or preclude the filing of particular pleadings or the making of arguments by DOE in any litigation, and this Agreement shall not create any right of action against DOE concerning the initiation, continuation or conduct of any litigation. All parties agree to cooperate (1) in defending this Agreement and (2) in any action required to be taken pursuant thereto

> in any litigation challenging its validity. All parties also agree that they ***will fully support the procedures and policies set forth herein in all present and future proceedings involving Alleged Crude Oil Violations*** and, to the extent any counsel approving the form and content of this Agreement by signature hereon enters an appearance in any such proceeding, counsel will not oppose or do anything inconsistent with such policies and procedures, the terms of this Agreement, or any orders pursuant thereto. Any Party may enforce this Agreement against any other Party but this Agreement confers no such enforcement right upon any non-Party hereto.

FSA ¶ VA.B. The language relied upon by the states is emphasized by italics.

As written, this provision is a commitment by all parties to the FSA to support the various substantive policies and procedures contained in the FSA. Paragraph VI.B does not provide any substantive rights. The states do not identify any procedures and policies of the FSA not supported by DOE. They just disagree with the OHA decision (Doc. 2265 at 17-19).

Judge Theis noted on more than one occasion that this court doe not sit as a court of appeals for OHA decisions: "As this court noted in denying the States' second motion to enforce, this court does not sit as a court of appeals for individual OHA refund decisions." In re the Department of Energy Stripper Well Exemption Litigation, 746 F. Supp. 1446, 1451 (D. Kan. 1990) (denying States' third motion to enforce). This court is not about to assume that role now. The FSA settled the stripper well litigation, along with the entitlements litigation, but it did not place OHA and its enforcement proceedings under this court's oversight.

The other provision of the FSA relied upon by the states is paragraph V.F, dealing with the termination of the entitlements litigation. That paragraph provides:

> **Termination of Entitlements Actions by DOE.** After

> commencement of the Entitlements Disbursement and vacation of the judgment in Texaco v. DOE, DOE agrees that it shall not order the purchase or sale of any further entitlements, either through entitlements lists or as a result of any exception decisions, and shall not institute or voluntarily participate in any judicial or administrative proceedings pertaining to the publication of any further entitlements notices. After commencement of the Entitlements Disbursement and vacation of the judgment in Texaco v. DOE, DOE shall take no action ***whatsoever pertaining to entitlements obligations based on runs-to-stills or crude oil receipts after December 31, 1980***, and further agrees to take no such action on the basis of any entitlements report filed by a Refiner with DOE for any re porting period after December 31, 1980, including reports filed with respect to the Entitlements Adjustment Notice (10 C.F.R. § 211.69).

FSA ¶ V.F. Once again, the particular language relied upon by the states is emphasized. This paragraph does set forth a policy or procedure for the breach of which DOE could be held liable. The court finds, however, that DOE did not violate this provision.

First, by taking the action it did, OHA did not take any "action . . . pertaining to entitlements" benefits. The states argue that OHA violated FSA ¶ V.F by eliminating Chevron's alleged restitutionary obligation based on entitlements benefits Chevron could have received had the January 1981 Notice been issued. However, OHA did not eliminate Chevron's alleged restitutionary obligation based on the entitlements program. OHA's role was to conduct a factual review to determine how much Chevron actually received as a result of its TIP certifications. OHA made a factual determination that Chevron was not unjustly enriched by the receipt of TIP revenue in excess of the amount allowed by the TIP regulations. Restitution is a remedy by which the defendant is made to disgorge an ill-gotten gain, or to restore the status quo, or both. See, e.g., Kern Oil & Refining Co. v. Tenneco Oil Co., 868

F.2d 1279, 12823 (Temp. Emer. Ct. App. 1989). Since there was no ill-gotten gain under the TIP certifications, there was no factual basis for an order of restitution. Nothing in the FSA barred Chevron from showing that it did not receive an unlawful benefit from the TIP.

Second, OHA was exercising prosecutorial discretion when it entered its decision. Consolidated Edison Company of New York, Inc. v. O'Leary, 131 F.3d 1475, 1481 (Fed. Cir. 1997).[5] OHA's dismissal of the proposed remedial order against Chevron was a part of DOE's prosecutorial function and as such, was unreviewable. A determination by OHA not to issue a remedial order is not appealable under the regulations. There is no right for the Secretary of Energy or any other person to appeal OHA's decision not to issue a remedial order. As the Federal Circuit recently stated in discussing this very same OHA proceeding, "Pursuant to the regulatory scheme, the decision of the Office of Hearings and Appeals not to issue a remedial order brought the proceeding against Chevron to an end." Id. at 1477. The procedures "leading up to the issuance of the remedial order would all be part of the 'prosecutorial' function of the Secretary of Energy." Id. at 1481.

Finally, paragraph IV.A.2 of the FSA specifically preserves DOE's prosecutorial discretion and shields it from review:

> Future DOE Actions. With the sole exception set froth in II.A.4, nothing in this Agreement shall be read or construed to limit or render reviewable the exercise of DOE's prosecutorial discretion in determining the appropriate action to take, if any, with regard to any enforcement matter. Further, nothing in this Agreement shall be read or construed to impose any obligation or duty upon the DOE regarding the enforcement or non-enforcement of its

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[5]This case was brought by the same entities which appear as amicus before this court. They challenged the same OHA decision in the Chevron proceeding that is the subject of the states' motion to enforce.

> regulations, and it remains solely in the DOE's discretion to determine whether an enforcement proceeding should be initiated, settled, pursued on particular terms or terminated.

FSA ¶ IV.A.2. The sole limitation referenced in this paragraph pertains to DOE's waiver of civil penalties against all parties to the FSA arising out of or relating to the counting of injection wells to qualify a property as a stripper property. FSA ¶ II.A.4. This provision is in applicable to the dispute before the court. Further, paragraph VI.B of the FSA provides that the FSA did not "create any right of action against DOE concerning the initiation, continuation or conduct of any litigation." FSA ¶ VI.B.

Discussion of the Jurisdictions' FSA Claims

The jurisdictions assert Chevron violated the FSA by misrepresenting to the states, DOE, and the court its position as an entitlements seller on the unissued January 1981 Entitlements Notice and by receiving the $61.7 million distribution under the FSA. In approving the Final Settlement Agreement, the court noted that $257 million "will be distributed among those refiners who would have had the right to sell entitlements if the remaining entitlements notices had been issued." In re the Department of Energy Stripper Well Exemption Litigation, 653 F. Supp. 109, 112 (D. Kan. 1986), aff'd, 855 F.2d 865 (Temp. Emer. Ct. App. 19988). The jurisdictions argue Chevron had no "right to sell entitlements" upon the issuance of the final notice because Chevron previously decertified its TIP oil.

Following DOE's November 1983 announcement that it would not publish the January 1981 Entitlements Notice, Chevron claimed tax credits from the IRS for its windfall profit tax liability resulting from its prior TIP certification. The basis for Chevron's tax refund claims was its belief that it would not receive economic value from its prior TIP certification. The jurisdictions' argument rests on the assumption that when Chevron claimed a refund of windfall profit taxes in 1983, it effectively decertified the TIP crude oil, and that, therefore, in 1986 when the FSA was approved,

Chevron had no right to sell entitlements if the January 1981 list had been issued.

OHA considered and rejected a similar argument during the administrative proceedings. The ERA claimed "that Chevron was duplicitous in its conduct in seeking from the IRS a refund of WPT [windfall profit taxes] associated with its 1981 TIP recertifications while maintaining its entitlements position in the event the January 1981 Entitlements Notice were ultimately issue." OHA Decision, p. 28. OHA found nothing sinister in Chevron's decision to "hedge its bets" by seeking an IRS refund of windfall profit taxes at a time when it was uncertain whether the January 1981 Entitlements Notice would be issued. When DOE determined not to issue the list, Chevron was vindicated in its action in seeking a refund of other taxes associated with its 1981 TIP recertifications. Id. As a result of its favorable position on the draft January 1981 Entitlements Notice, Chevron received $61.6 million under the FSA, and OHA concluded that Chevron must include that amount as tertiary revenue for 1981. Id.

The jurisdictions assume that, in 1983, Chevron had to elect between a windfall profit tax refund and remaining on the entitlements list. There is nothing in the FSA requiring such an election. The jurisdictions cite no authority treating a claim for windfall profit tax refund as a downward certification of oil that has been certified upward. There is no support for the claim that by filing a claim for windfall profit tax refund, Chevron repudiated its position as an entitlements seller. The pursuit of alternative courses of action is not fraud.

Further, tax matters were excepted from the settlement by Proviso (E) to the Refiners Release. FSA, Settlement Exh. A, Attachment A, 2nd proviso, para. E. The Refiners Release of Claims preserved to the refiners participating in the settlement the right to pursue state or federal claims for severance or windfall profit tax refunds. Judge Theis observed in another context, tax refund claims do not arise under and are not governed by the FSA. In re the Department of Energy Stripper Well Exemption

Litigation, 739 F. Supp. 1449, 1454 (D. Kan. 1990). Windfall profit tax refunds were outside the scope of the FSA.

Finally, the FSA imposed no obligation on Chevron as a settling refiner to disclose its pending windfall profit tax refund claim. Accordingly, Chevron cannot be found to have committed fraudulent misrepresentation.

Because Chevron did not commit fraud, the jurisdictions' claim that DOE failed to report Chevron's fraud to this court collapses of its own weight.

Conclusion

The states' and jurisdictions' motions to enforce shall be denied.

A motion for reconsideration is neither invited nor encouraged. Any motion for reconsideration must comply with Rule 7.3 of this court and the standards set out in Comeau v. Rupp, 810 F. Supp. 1172, 1174 (D. Kan. 1992). The motion may not exceed five double-spaced pages in length, including supporting arguments and authorities, regardless of the number of points raised. Responses shall be limited to four double-spaced pages. No replies may be filed. Motions for extension of these time periods will be viewed with disfavor. The filing of such a motion does not relieve the party of its obligation to meet the relevant deadline, even if the motion is not ruled upon prior to the expiration of the deadline.

IT IS BY THIS COURT THEREFOR ORDERED that the states' motion to enforce (Doc. 2264), filed in M.D.L. 378) is hereby denied.

IT IS FURTHER ORDERED that the jurisdictions' motion to enforce (Doc. 2274, filed in M.D.L. 378) is hereby denied.

IT IS SO ORDERED.

Dated this 20th day of January 1999, at Wichita, Kansas

Monti L. Belot
UNITED STATES DISTRICT JUDGE

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1291 Final Decisions of District Courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

§ 1295 Jurisdiction of the United States Court of Appeals for the Federal Circuit.

(a)The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

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(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973; . . .

§ 1631 Transfer to Cure Want of Jurisdiction.

Whenever a civil action is filed in a court as defined in section 6120 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with

such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court form which it is transferred.

Supreme Court, U.S.
FILED
AUG 30 2000
CLERK

(2)

No. 99-1952

In the Supreme Court of the United States

STATE OF ALABAMA, ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals lacked jurisdiction over petitioners' appeals.

2. Whether the court of appeals abused its discretion in denying petitioners' motion under 28 U.S.C. 1631 to transfer proceedings to the United States Court of Appeals for the Federal Circuit.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A3-A18) is reported at 206 F.3d 1345.[1] The opinion of the district court (Pet. App. C1-C16) is unreported. The decision of the Department of Energy's Office of Hearings and Appeals is reported at 25 DOE (CCH) ¶ 82,506.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2000. The petition for rehearing was denied

[1] The original opinion of the court of appeals (Pet. App. B1-B16) is unreported.

on March 6, 2000 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on June 5, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between August 1973 and January 1981, the Economic Stabilization Act of 1970 (ESA), Pub. L. No. 91-379, 84 Stat. 799, and the Emergency Petroleum Allocation Act of 1973 (EPAA), Pub. L. No. 93-159, 87 Stat. 627, established a program of price and allocation controls over crude oil and refined petroleum products. Under those provisions, the Department of Energy (DOE) established a self-certifying Tertiary Incentive Program (TIP), which allowed crude oil sales at market prices, for oil produced from more costly tertiary recovery projects, in order to recoup the additional expense. Pet. App. A5 n.2. In 1992, the DOE's Economic Regulatory Administration (ERA) issued a Proposed Remedial Order (PRO) to respondent Chevron U.S.A. Inc., alleging that Chevron misrepresented its status under the TIP and that Chevron should therefore disgorge approximately $125 million, plus interest, that it had received under the program. *Id.* at A5-A6. Chevron challenged the PRO before DOE's Office of Hearings and Appeals (OHA), which dismissed the charges against Chevron, reasoning that "the ERA has failed to establish[] that Chevron was in fact unjustly enriched by its participation in the TIP as alleged in the PRO." *Id.* at A6.

2. a. In 1996, a group of private utilities and paper manufacturers, which claimed that they would have obtained additional funds from any recovery obtained by DOE from Chevron, filed suit in the United States District Court for the District of Columbia challenging

OHA's decision. Pet. App. A6. The district court dismissed the suit on the ground that the plaintiffs lacked standing to challenge the decision of the Department of Energy not to pursue enforcement proceedings against Chevron. The utilities and manufacturers appealed that dismissal to the Federal Circuit, which has exclusive jurisdiction of appeals under the ESA and EPAA. See 28 U.S.C. 1295(a)(11) and (12). The Federal Circuit affirmed. *Consolidated Edison Co. of N.Y., Inc.* v. *O'Leary*, 131 F.3d 1475 (Fed. Cir. 1997). The Federal Circuit reasoned that, under the EPAA and ESA, "the initiation of a public enforcement action * * * is committed to the discretion of the Secretary of Energy." *Id.* at 1479; see also *id.* at 1482 (concluding that review of OHA's decision was unreviewable under *Heckler* v. *Chaney*, 470 U.S. 821 (1985)). The Federal Circuit also rejected the argument that it could review OHA's decision because OHA had reversed the decision of the ERA. The court explained that, under Section 503 of the Department of Energy Organization Act (DOEOA), 42 U.S.C. 7193, which authorizes the Secretary of the DOE to issue remedial orders, the procedures the Secretary utilized for bringing enforcement actions were "all * * * part of the 'prosecutorial' function of the Secretary." 131 F.3d at 1481.

After the Federal Circuit's decision in *Consolidated Edison*, petitioners filed an amici curiae brief asserting that the Federal Circuit lacked jurisdiction because the court of appeals had construed Section 503 of the DOEOA, in addition to provisions of the ESA and EPAA. On March 25, 1998, the court of appeals issued an unpublished per curiam opinion rejecting petitioners' argument. The court observed that 28 U.S.C. 1295(a)(11) and (12) grant it exclusive jurisdiction over appeals from district court decisions "in cases and

controversies arising under" the ESA and EPAA. *Consolidated Edison* v. *Peña*, No. 97-1242, 1998 WL 133266, *1 (Fed. Cir. Mar. 25, 1998). The court noted that "[i]t is well settled that [the court's] jurisdiction over appeals in ESA/EPAA cases permits [the court] to construe other statutes when necessary to resolve the ESA/EPAA issue raised on appeal." *Id.* at *2. The court also explained that its decision in *Consolidated Edison* had "discussed section 503 of the DOEOA simply because that statutory provision helps provide an answer to the question whether third parties have rights to insist that public enforcement proceedings be brought to enforce the ESA/EPAA regulations, an issue that clearly arises under the ESA and the EPAA." *Ibid.*

b. Meanwhile, in 1996, petitioners and a group of other States and territories (the Jurisdictions) had filed three suits in the United States District Court for the District of Kansas, contending that OHA's decision was inconsistent with the Department of Energy's obligations under a Final Settlement Agreement (FSA) that had resolved a dispute involving over $1 billion in overcharge funds collected by DOE under the ESA and the EPAA. Pet. App. A4-A5. The district court dismissed all three suits, holding that "OHA's dismissal of the proposed remedial order against Chevron was a part of DOE's prosecutorial function and as such, was unreviewable." *Id.* at A6-A7; see also *id.* at C12.[2] The

[2] Paragraph IV.A.2 of the FSA provides that nothing in that agreement, which concerns the distribution of overcharges that the Department of Energy collects under the ESA and EPAA, "shall be read or construed to limit or render reviewable the exercise of DOE's prosecutorial discretion" with respect to enforcement matters that would lead to the collection of overcharges in the first place. See Pet. App. A13.

district court also found that OHA's decision did not violate the terms of the FSA and that petitioners lacked standing to bring their claims. *Id.* at A7-A8.

3. Petitioners and the Jurisdictions appealed the district court's decisions to both the Tenth Circuit and the Federal Circuit. On April 27, 1999, petitioners filed a motion requesting the Federal Circuit to stay proceedings pending the outcome of their appeals to the Tenth Circuit. On May 7, 1999, the government opposed petitioners' motion, arguing that a stay would delay the Federal Circuit from exercising its exclusive jurisdiction over petitioners' appeals. On June 14, 1999, the Federal Circuit denied the motion and directed petitioners to file their opening briefs within 30 days. On July 22, 1999, the Federal Circuit denied petitioners' motion for reconsideration.

On August 11, 1999, petitioners submitted a letter to the Federal Circuit stating that they were withdrawing their appeals. The Federal Circuit treated petitioners' letters as motions and permitted the government and Chevron to respond. The government opposed dismissal, unless dismissal would be with prejudice to any further review by the Federal Circuit of the district court's decisions. The government explained that petitioners' proposed withdrawal was an attempt at forum shopping, as petitioners were attempting to avoid the precedential effect of the Federal Circuit's decision in *Consolidated Edison.* The government further explained that

> [i]f [petitioners'] identical Tenth Circuit appeal is dismissed for lack of appellate jurisdiction, for example, [petitioners] could ask that court, pursuant to 28 U.S.C. § 1631, to transfer that appeal to this Court. If the Tenth Circuit appeal were trans-

> ferred, [petitioners] undoubtedly would contend that they would still have the right to challenge the order which is the subject of the present appeal because the withdrawal, without more, would not have finality attached to it.

99-1356 Opposition of Federal Appellees to Appellant's Motion to Withdraw Appeal 3 (Fed. Cir. Aug. 25, 1999) (footnote omitted).

On August 31, 1999, the Federal Circuit issued an order observing that the Jurisdictions' appeal was proceeding and that the court of appeals had denied petitioners' motion for a stay and motion for reconsideration. The court of appeals therefore ordered that—

> any dismissal entered * * * will be with prejudice. As Chevron and DOE point out, if a dismissal is entered without prejudice, [petitioners] could, in the event of an adverse ruling by the 10th Circuit, seek to resurrect [their] appeal here by way of transfer. That would be an impermissible result, given our prior rulings and the fact that [the Jurisdictions' appeal] is proceeding in this court.

App. A, *infra*, 3a-4a. The Federal Circuit further ordered that, in the absence of any further objection by petitioners within 10 days, petitioners' motion to withdraw would be granted and the appeals dismissed "with prejudice." *Id.* at 4a. The Federal Circuit also ordered that, if petitioners proceeded with their appeals, their briefs were due in 14 days from the filing of the court's order. *Ibid.*

On September 1, 1999, petitioners wrote to the Federal Circuit, stating that they were

> in receipt of a copy of the non-precedential order * * * issued by the court on August 31, 1999. Paragraph "(1)" of the order provides that, "absent objection by [petitioners] within 10 days, the Court will grant [petitioners'] motion to withdraw its appeals and dismiss them with prejudice."
>
> Without forgoing any other rights or objections they may have in these or any other proceedings, [petitioners] have no objection to the entry forthwith of an order in the form specified in paragraph "(1)" of the August 31 order.

App. B, *infra*, 5a-6a.

On September 13, 1999, the Federal Circuit dismissed petitioners' appeals with prejudice.[3]

4. The Tenth Circuit thereafter dismissed the appeals of petitioners and the Jurisdictions on jurisdictional grounds. Pet. App. A1-A18. The court first observed that the Federal Circuit has exclusive jurisdiction over disputes arising under the ESA and the EPAA, the crude oil price control provisions of which "formed the basis for the controversy resolved by the FSA." *Id.* at A8. The court also noted that, although the Jurisdictions acknowledged that their claims were based on the FSA, petitioners had "carefully phrased the issues presented * * * to avoid any mention of the FSA" and instead had asked the court to address whether OHA's decision was an unreviewable act of prosecutorial discretion under the DOEOA. *Id.* at A11.

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[3] As to the Jurisdictions' appeal, on March 10, 2000, the Federal Circuit affirmed the decision of the district court in an unpublished per curiam decision. *In re DOE Stripper Well Exemption Litigation*, No. 99-1327, 2000 WL 274298 (Fed. Cir. Mar. 10, 2000).

The court concluded, however, that "notwithstanding [petitioners'] careful semantics," "determining whether the OHA's decision in this case is properly reviewable would require this court to consider issues arising both under the ESA and EPAA directly and under the FSA." *Id.* at A11, A12. The court therefore "decline[d] to participate in the fiction that this dispute does not turn squarely on the ESA, the EPAA, and the FSA." *Id.* at A13.

The Tenth Circuit also denied petitioners' motion to transfer their appeals to the Federal Circuit under 28 U.S.C. 1631, which authorizes the transfer to another court "in which the action or appeal could have been brought," if the transferor court finds that transfer "is in the interest of justice." The court observed that petitioners had withdrawn their appeals to the Federal Circuit with the understanding that that court would dismiss their appeal with prejudice. Pet. App. A17. The court further observed that, "[i]n the order directing [petitioners] to proceed with the appeals or face dismissal, the Federal Circuit anticipated that [petitioners] might request that [the Tenth Circuit] transfer the actions back to the Federal Circuit." *Ibid.* The court therefore concluded that, "[i]n light of th[e] unequivocal declaration by the Federal Circuit that it intended to finally dispose of [petitioners'] appeals, and in light of [petitioners'] ample opportunity to pursue these cases in the proper forum," the court could not "say that justice would be served by transfer to the Federal Circuit." *Id.* at A17-A18.

ARGUMENT

1. Petitioners contend (Pet. 12-19) that the court of appeals had subject matter jurisdiction to decide whether the district court erred in relying on Section

503 of the DOEOA, 42 U.S.C. 7193, as a basis for ruling that OHA's decision not to issue a remedial order against Chevron is unreviewable. The court of appeals correctly rejected that contention, explaining that "determining whether the OHA's decision in this case is properly reviewable would require this court to consider issues arising both under the ESA and EPAA directly and under the FSA." Pet. App. A12. Petitioners do not contest that those matters are within the Federal Circuit's exclusive jurisdiction. See 28 U.S.C. 1295(a)(11) and (12). As the court of appeals further explained, the district court had based its holding that OHA's decision was unreviewable on the Federal Circuit's decision in *Consolidated Edison*, which "relied heavily on interpretation of ESA/EPAA issues to reach its result." Pet. App. A12. The court of appeals reasoned, moreover, that it could not adjudicate the merits of petitioners' appeals "without reference" to "the agreement underlying this dispute," the FSA, upon which both the government and Chevron relied as a defense to petitioners' suits. *Id.* at A13.[4] Thus, in explaining that it would "decline[] to participate in the fiction that this dispute does not turn squarely on the ESA, the EPAA, and the FSA," the court stated:

> In order to grant the relief sought by [petitioners], we would have to conduct inquiries specifically committed to the expertise of the Federal Circuit. Specifically, we would have to reject a Federal Circuit decision explicitly resting on those statutes, interpret and distinguish a paragraph of the FSA

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[4] Petitioners themselves repeatedly recognize that "[t]his case involves the effort of [petitioners] to enforce [the FSA]." Pet. 1; see also Pet. 11 (petitioners "have asked a federal court to enforce a massive settlement agreement."); accord Pet. 26.

> directly on point, and consider a defense implicating the FSA.

Id. at A13-A14. In those circumstances, the court of appeals properly rejected petitioners' attempt to characterize their claims as not arising under statutes within the Federal Circuit's exclusive jurisdiction.[5]

Finally, the court of appeals' jurisdictional holding raises no issue of continuing importance. This dispute arises out of a 1986 agreement that settled a controversy under the now defunct price control program established under the ESA and EPAA.[6] We are not aware of any other pending enforcement litigation arising out of the ESA and EPAA, much less the settlement agreement at issue in this case. Further review of the court of appeals' jurisdictional ruling is therefore unwarranted.

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[5] Contrary to petitioners' suggestion (Pet. 17), the court of appeals' ruling does not conflict with *Atlantic Richfield Co.* v. *United States Department of Energy*, 769 F.2d 771 (D.C. Cir. 1984). That decision simply held that the D.C. Circuit had jurisdiction to review a discovery order that OHA issued "exclusively" under the DOEOA, *id.* at 780, and that the Secretary of Energy could adjudicate remedial orders, *id.* at 785-796. By contrast, there is no dispute in this case that the settlement agreement that petitioners seek to enforce arises under the EPAA and ESA. Pet. App. A8. Moreover, in holding that the Secretary can adjudicate remedial orders, the D.C. Circuit's decision in no way suggests that the Secretary's decision *not* to initiate enforcement proceedings is reviewable. See 769 F.2d at 798 ("Indubitably, the Secretary has been given full procedural discretion in the issuance of remedial orders."); accord *Consolidated Edison*, 131 F.3d at 1478-1482 (holding that private parties have no right to judicial review of Secretary's decision not to issue a remedial order).

[6] The ESA expired on June 30, 1982. 12 U.S.C. 1910 (note). The EPAA expired on September 30, 1981. 15 U.S.C. 760g (note).

2. Petitioners further argue (Pet. 23-26) that the court of appeals improperly declined to transfer their appeals to the Federal Circuit under 28 U.S.C. 1631. That factbound contention lacks merit. The decision whether to transfer a proceeding under 28 U.S.C. 1631 is committed to the discretion of the transferor court. See, *e.g.*, *Friedman* v. *Daley*, 156 F.3d 1358, 1360 (Fed. Cir. 1998); *Hays* v. *Postmaster Gen. of the United States*, 868 F.2d 328, 331 (9th Cir. 1989) (per curiam). The Tenth Circuit was well within its discretion in concluding that a transfer of petitioners' appeals was not in the interest of justice.

Petitioners originally appealed the district court's decisions to the Federal Circuit. After the Federal Circuit denied petitioners' request to stay their appeals pending the Tenth Circuit's disposition in this case, petitioners voluntarily sought to withdraw their notice of appeal. The government, accurately predicting both that the Tenth Circuit would find that it lacked jurisdiction over petitioners' appeals and that petitioners would then seek under 28 U.S.C. 1631 to transfer their appeals to the Federal Circuit, opposed petitioners' attempt to withdraw their appeals unless the Federal Circuit dismissed the appeals with prejudice. See pp. 5-6, *supra*. Moreover, the Federal Circuit, which also anticipated that petitioners would request a transfer back to the Federal Circuit, specifically advised petitioners that if they did not proceed with their appeals, dismissal would be with prejudice. Pet. App. A17.[7] Despite those considerations, petitioners volun-

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[7] Petitioners also were aware not only that the Federal Circuit in *Consolidated Edison* had rejected their claims on the merits but also that the Federal Circuit considered petitioners'

tarily withdrew their appeals. The court of appeals therefore properly found that, "[i]n light of th[e] unequivocal declaration by the Federal Circuit that it intended to finally dispose of [petitioners'] appeals, and in light of [petitioners'] ample opportunity to pursue these cases in the proper forum," transfer was not in the interest of justice. *Id.* at A17-A18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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AUGUST 2000

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claims under the DOEOA to be within the Federal Circuit's exclusive jurisdiction. See *Consolidated Edison* v. *Peña, supra.*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-1327, -1328

IN RE THE DEPARTMENT OF ENERGY
STRIPPER WELL EXEMPTION LITIGATION

STATE OF DELAWARE, STATE OF HAWAII,
STATE OF ILLINOIS, STATE OF KANSAS,
STATE OF NEBRASKA, STATE OF NEVADA,
STATE OF NORTH CAROLINA,
STATE OF RHODE ISLAND,
STATE OF WEST VIRGINIA, TERRITORY OF GUAM,
AND THE VIRGIN ISLANDS,
MOVANTS-APPELLANTS

AND

STATE OF ALABAMA, STATE OF CONNECTICUT,
STATE OF IDAHO, STATE OF INDIANA,
STATE OF MARYLAND, STATE OF MICHIGAN,
STATE OF MISSISSIPPI, STATE OF MONTANA,
STATE OF OHIO, STATE OF SOUTH DAKOTA,
STATE OF VERMONT, STATE OF WISCONSIN,
AND STATE OF WYOMING,
MOVANTS-APPELLANTS

AND

STATE OF CALIFORNIA, MOVANT-APPELLANT

v.

DEPARTMENT OF ENERGY, RESPONDENT-APPELLEE

AND

CHEVRON U.S.A. INC., RESPONDENT-APPELLEE

99-1356

STATE OF ALABAMA,
STATE OF CONNECTICUT,
STATE OF IDAHO, STATE OF INDIANA,
STATE OF MARYLAND, STATE OF MICHIGAN,
STATE OF MISSISSIPPI, STATE OF MONTANA,
STATE OF OHIO, STATE OF SOUTH DAKOTA,
STATE OF VERMONT, STATE OF WISCONSIN,
AND STATE OF WYOMING, PLAINTIFFS-APPELLANTS

AND

STATE OF CALIFORNIA, PLAINTIFF-APPELLANT

v.

DEPARTMENT OF ENERGY, BILL RICHARDSON,
SECRETARY OF ENERGY, OFFICE OF HEARINGS
AND APPEALS, GEORGE B. BREZNAY, DIRECTOR,
OFFICE OF HEARINGS AND APPEALS,
DEPARTMENT OF ENERGY, DEFENDANTS-APPELLEES

AND

CHEVRON U.S.A. INC., DEFENDANT-APPELLEE

[Filed: Aug. 31, 1999]

ON MOTION

Before: CLEVENGER, Circuit Judge.

ORDER

The States of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin, and Wyoming (Alabama) move to voluntarily withdraw appeal nos. 99-1328 and 99-1356. Chevron U.S.A. Inc. and the Department of Energy (DOE) oppose the motion unless the dismissal is "with prejudice." Chevron moves to dismiss appeal nos. 99-1328 and 99-1356 with prejudice due to Alabama's failure to file a brief.

This court earlier denied Alabama's motion for a stay of proceedings in this court pending completion of proceedings in the United States Court of Appeals for the 10th Circuit, and also denied Alabama's motion for reconsideration of that order. We note that the State of Delaware et al.'s appeal in no. 99-1327, consolidated with Alabama's appeal no. 99-1328, is proceeding.

In light of these circumstances, any dismissal entered in appeal nos. 99-1328 and 99-1356 will be with prejudice. As Chevron and DOE point out, if a dismissal is entered without prejudice, Alabama could, in the event of an adverse ruling by the 10th Circuit, seek to resurrect its appeal here by way of transfer. That would

be an impermissible result, given our prior rulings and the fact that appeal no. 99-1327 is proceeding in this court.

Accordingly,

IT IS ORDERED THAT:

(1) Absent objection by Alabama within 10 days, the court will grant Alabama's motion to withdraw its appeals and dismiss them with prejudice.

(2) Chevron's motion to dismiss nos. 99-1328 and 99-1356 due to Alabama's failure to file briefs is denied.

(3) If Alabama decides to proceed with these appeals, its briefs in nos. 99-1328 and 99-1356 are due within 14 days from the date of filing of this order. No further extension should be anticipated.

8/31/99
Date

/s/ RAYMOND C. CLEVENGER, III
RAYMOND C. CLEVENGER, III
Circuit Judge

cc: Bernard Nash, Esq.
James F. Flug, Esq.
Yeoryios C. Apallas, Esq.
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APPENDIX B

[Law firm text omitted from letterhead]

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September 1, 1999

Jan Horbaly, Esq.
Clerk, U.S. Court of Appeals for the Federal Circuit
717 Madison Place, Suite 401
Washington, D.C. 20439

Re: Alabama v. Energy, Cases No. 99-1328; 99-1356

Dear Mr. Horbaly:

Appellants, the States of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin, and Wyoming ("the States" or "Alabama") are in receipt of a copy of the non-precedential order in the

above numbered cases issued by the court on August 31, 1999. Paragraph "(1)" of the order provides that, "absent objection by Alabama within 10 days, the court will grant Alabama's motion to withdraw its appeals and dismiss them with prejudice."

Without forgoing any other rights or objections they may have in these or any order proceedings, the States have no objection to the entry forthwith of an order in the form specified in paragraph "(1)" of the August 31 order.

Respectfully submitted,

/s/ JAMES F. FLUG
JAMES F. FLUG

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And on behalf of Yeoryios Apallas, Attorney for California

cc: Paul Michael, Attorney for DOE
Robert Westberg, Attorney for Chevron
Bernard Nash, Attorney for Delaware, et al.

Supreme Court, U.S.
FILED
AUG 30 2000
CLERK

(3)

No. 99-1952

In the Supreme Court of the United States

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN and WYOMING,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and CHEVRON U.S.A. INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CHEVRON U.S.A. INC.

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit correctly ruled that the issues raised by petitioners on an appeal from an order denying a motion to enforce the Final Settlement Agreement in *In re: Department of Energy Stripper Well Exemption Litigation*, M.D.L. 378 (D.Kan.), are not "discrete and severable" from issues arising under the settlement agreement itself and under the Emergency Petroleum Allocation Act,[1] and therefore fall within the exclusive jurisdiction of the Federal Circuit.

2. Whether the Tenth Circuit could reasonably have concluded that the "interest of justice" standard in the Transfer Statute, 28 U.S.C. § 1631, is not served by transferring petitioners' appeal to the Federal Circuit where the court had determined that petitioners' jurisdictional argument was based on a "fiction" and where petitioners had previously agreed to a dismissal "with prejudice" by the Federal Circuit of an identical appeal by petitioners from the same district court order.

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[1] Pub.L. No. 93-159, 87 Stat. 628 (1973), codified as amended, but omitted, at 15 U.S.C. §§ 751-760.

CORPORATE DISCLOSURE STATEMENT AND LIST OF PARTIES TO THE PROCEEDINGS IN THE TENTH CIRCUIT

Respondent Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation, a publicly held corporation.

The petition fails to identify parties to the proceedings in the Tenth Circuit in addition to those named in the caption in this Court: respondents Bill Richardson, Secretary of Energy (successor to Hazel O'Leary), Office of Hearings and Appeals of the United States Department of Energy and George B. Breznay, its Director, and appellants the States of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Rhode Island and West Virginia, the Territory of Guam and the Virgin Islands (the "Jurisdictions"). The Tenth Circuit's judgment that petitioners seek to review also dismissed an appeal of the Jurisdictions (No. 99-3102) from the same order of the district court from which petitioners appealed. Following that dismissal, the appellant Jurisdictions pursued a previously filed appeal to the Federal Circuit (No. 99-1327). On March 10, 2000, the Federal Circuit issued its judgment in 99-1327 affirming the decision of the district court as to the appellant Jurisdictions.

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BRIEF IN OPPOSITION FOR RESPONDENT CHEVRON U.S.A. INC.

Respondent Chevron U.S.A. Inc. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in that court's docket Nos. 99-3065 and 99-3066 on March 6, 2000.

OPINIONS BELOW

Though petitioners apparently intend to limit their petition to the Tenth Circuit's disposition of the appeal in No. 99-3065 (M.D.L. 378 in the district court), the same circuit court decision dismissed two appeals by petitioners, Nos. 99-3065 and 99-3066. The appeals were based, respectively, on an order of the United States District court for the District of Kansas denying petitioners' motion to enforce the *Stripper Well* Final Settlement Agreement ("FSA") in M.D.L. 378 and a judgment of the same district court dismissing an original lawsuit brought by petitioners (No. 96-1180) containing the same allegations as their motion to enforce. Omitted from the petition is the unreported Order of Dismissal of the district court in No. 96-1180 that dismissed Count I of the original action for failure to state a claim and the remaining counts for lack of standing and, alternatively, improper venue. Appellate Appendix in 99-3066 (hereinafter 99-3066 App) 219-223.

The agency action that petitioners challenged in the district court, a Department of Energy ("DOE") order dated March 25, 1996 dismissing a proposed remedial order to respondent Chevron U.S.A. Inc., is unofficially reported as *Chevron U.S.A. Inc.*, 25 DOE (CCH) ¶ 82,506 (1996). The same agency order was also challenged in *Consolidated Edison Co. of New York v. O'Leary*, 131 F.3d 1475 (Fed.Cir. 1997), *suggestion of lack of jurisdiction rejected sub nom Consolidated Edison Co. of New York, Inc. v. Peña*, 152 F.3d 945 (Fed.Cir. 1998), in which petitioners participated as amici in the district court and on the appeal.

STATEMENT OF THE CASE

The case began as an enforcement proceeding by the DOE against Chevron under regulations establishing domestic crude oil price controls. The controls were originally promulgated pursuant to the Economic Stabilization Act ("ESA").[2] The ESA expired by its terms April 30, 1974,[3] but portions of it were incorporated by reference into § 5(a)(1) of the Emergency Petroleum Allocation Act ("EPAA").[4] The DOE and its predecessor agencies enforced the controls until their termination by President Reagan in January 1981. The EPAA expired September 30, 1981, subject to a savings clause. Under § 211 of the ESA, as incorporated into the EPAA, on appeals from district court rulings, issues arising under these statutes or the regulations were within the exclusive jurisdiction of the Temporary Emergency Court of Appeals of the United States ("TECA"), and are now within the exclusive jurisdiction of the Federal Circuit.[5]

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[2] Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743 (1971), last codified following 12 U.S.C. § 1904 note (1980).

[3] Economic Stabilization Act Amendments of 1973, Pub.L. No. 93-28, 87 Stat. 27 (1973).

[4] Pub.L. No. 93-159, 87 Stat. 628 (1973), codified as amended, but omitted, at 15 U.S.C. §§ 751-760.

[5] The Public Courts Administration Act of 1992 amended § 211(b) of the ESA to provide:

> (b) Appeals from orders or judgments entered by a district court of the United States in cases and controversies arising under this title shall be brought in the United States Court of Appeals for the Federal Circuit if the appeal is from a final decision of the district court or is an interlocutory appeal permitted under section 1292(c) of title 28, United States Code.

Pub.L. 102-572, § 102, 106 Stat. at 4506 (1992). Concurrently, 28 U.S.C. § 1295(a) was amended to add to the Federal Circuit's

(footnote continued)

The statutory and administrative history of the ESA, the EPAA, TECA, and the administrative bodies responsible for enforcing the ESA and EPAA, was recently set forth by the Federal Circuit. *See Phoenix Petroleum Co. v. U.S. F.E.R.C.*, 95 F.3d 1555, 1559-1563 (Fed.Cir. 1996).

In 1992, the DOE's Economic Regulatory Administration ("ERA"), issued a proposed remedial order to Chevron alleging that Chevron had received excessive benefits as a result of its participation during 1980-1981 in a DOE program known as the "Tertiary Incentive Program" ("TIP"). 99-3065 App at 44. The proposed remedial order, if issued as a final order, would have required Chevron to pay the DOE "restitution" of $125.0 million, later increased to $167.3 million, plus interest, for excess benefits allegedly received.

The authority to issue a remedial order was and is the Secretary's. Within the DOE, that authority was delegated to DOE's Office of Hearings and Appeals ("OHA").[6] Chevron requested and was granted a hearing before OHA, limited to the factual issue whether Chevron had received an excessive benefit under the TIP. 99-3065 App at 55-56. Following the hearing, OHA ordered the proposed remedial order dismissed on the ground that the ERA "failed to establish the existence of a substantive violation requiring restitution on the part of Chevron." *Id.* at 57. Specifically, OHA concluded that "Chevron was not unjustly enriched since the firm did not actually receive revenue in excess of its recoupable allowed expenses under TIP, and there was no injury to third parties as a result of the termination of

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jurisdiction appeals under § 211 of the ESA and under § 5 of the EPAA.

[6] The petition incorrectly suggests that the Secretary's discretion to issue a remedial order was delegated to the ERA. Petition at 4, n. 7. The ERA had no authority to issue a remedial order; only the OHA could do so. DOE Delegation Order No. 0204-24 (Mar. 30, 1978), *reproduced in* 99-3065 App at 183-188; *see also* 10 C.F.R. §§ 205.190, 205.193(e), 205.199B (2000).

price controls." *Id.* at 81, footnote omitted. OHA did not reach other issues raised by Chevron in its statement of objections to the proposed remedial order. *Id.* at 56-57.[7]

A number of entities, including petitioners, were allowed to participate in the proceedings before OHA because they claimed a right to share in amounts the DOE might have collected had the proposed remedial order been issued as a final order.[8] Some of those entities then brought separate lawsuits challenging the DOE's decision not to issue a remedial order to Chevron:

(a) *Consolidated Edison Co. of New York v. O'Leary*, No. 96-1149 (D.D.C.), was filed in the District Court for the District of Columbia by a group of utilities and others. That case sought to overturn the OHA order and to compel the DOE to issue a remedial order to Chevron. Chevron, which was not named as a party, intervened and moved with the federal defendants to dismiss on the ground of a lack of standing to sue, among other grounds. In January 1997, the district court ordered the complaint dismissed for lack of standing of the plaintiffs to sue. The Federal Circuit affirmed the dismissal for lack of standing and went on further to say that the decision not to issue a remedial order was within the DOE's discretion and was unreviewable. *Consolidated Edison Co. of New York v. O'Leary*, *supra*, 131 F.3d at 1480. Petitioners participated as amici in *Consolidated Edison* in the district court and in the Federal Circuit.

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[7] The implication in the petition, page 4, that the OHA decision conferred an offset or an entitlements benefit on Chevron is incorrect. *See* 99-3065 App at 80-82, 281-282.

[8] Petitioners describe themselves as "parties" in the proceedings before the OHA. Petition at 4. "The [OHA] is free to permit third parties to participate in proceedings before it, for such assistance as those parties may offer, without creating a right in those parties to review a negative decision that the Office may ultimately make." *Consolidated Edison Co. of New York v. O'Leary*, *supra*, 131 F.3d at 1481.

(b) Motion of Alabama, et al., to Enforce the Final Settlement Agreement ("FSA") in *In Re: Department of Energy Stripper Well Exemption Litigation,* M.D.L. 378 (D.Kan.), and

(c) *Alabama, et al. v. United States Department of Energy, et al.*, No. 96-1180 (D.Kan.).

These two proceedings, filed simultaneously by petitioners, are the subject of the Tenth Circuit decision as to which certiorari is sought. Each challenged the OHA decision on the same grounds that were alleged by the *Consolidated Edison* plaintiffs and in addition on the ground that by dismissing the proposed remedial order against Chevron the DOE violated its obligations under the FSA, which had been approved by the district court in Kansas in 1986.[9] (The *Consolidated Edison* plaintiffs were not parties to the FSA.) In both proceedings, Chevron and the DOE opposed on the merits petitioners' claim that there was a violation of the FSA. 99-3065 App at 91, 109; 99-3066 App at 48, 75. In the original action, No. 96-1180, the DOE and Chevron moved to dismiss the claims not based on the FSA for lack of standing and improper venue. *Ibid.*

Following briefing and argument, the district court denied petitioners' motion to enforce the FSA in M.D.L. 378 and dismissed the action in No. 96-1180. Petition Appendix at C-1 to C-16; 99-3066 App at 219.[10]

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[9] The FSA is described in *In re Dept. of Energy Stripper Well Exemption Lit.*, 653 F.Supp. 108 (D.Kan. 1986).

[10] The district court's order in M.D.L. 378 also denied a separate motion to enforce the FSA brought by another group of states, and others, referred to below as the "Jurisdictions." Petition Appendix at C-1, C-4 to C-5, C-13 to C-16. The denial of the Jurisdictions' motion to enforce was affirmed on appeal to the Federal Circuit in March 2000. *In re the Department of Energy Stripper Well Exemption Litigation*, __ F.3d __, 2000 U.S. App. LEXIS 4431 (Fed.Cir. 2000).

In M.D.L. 378, the district court reviewed the terms of the FSA and concluded that the dismissal of the proposed remedial order violated no duty imposed by the FSA. Petition Appendix at C-9 to C-13. Citing *Consolidated Edison*, the court ruled that the decision not to issue a remedial order to Chevron was within the DOE's prosecutorial discretion and referred to provisions in the FSA that the court ruled shielded the DOE decision from review. Among the provisions of the FSA relied on by the district court is paragraph IV.A.2, which provides, in part:

> [N]othing in this Agreement shall be read or construed to impose any obligation or duty upon the DOE regarding the enforcement or non-enforcement of its regulations, and it remains solely in the DOE's discretion to determine whether an enforcement proceeding should be initiated, settled, pursued on particular terms or terminated.

Petition Appendix at C-12 to C-13, quoting the FSA.

The district court limited its ruling in M.D.L. 378 to claims of a violation of the FSA, *id.* at C-3 to C-4. But in docket 96-1180 the court ruled on the non-FSA claims, holding that petitioners lacked standing to protest on non-FSA grounds the DOE's refusal to issue a remedial order to Chevron. In the alternative, the court dismissed those claims for improper venue. 99-3066 App at 220-221. The court dismissed the count of the complaint in 96-1180 that alleged a violation of the FSA "for failure to state a claim", commenting that the claim "fails for the same reason the [petitioners'] motion to enforce in M.D.L. 378 fails." *Ibid.*

Petitioners filed four appeals from the district court's order and judgment, two appeals to the Tenth Circuit (Nos. 99-3065, -3066) and, a month later, two appeals to the Federal Circuit (Nos. 99-1328, -1356). The DOE and Chevron moved to dismiss the Tenth Circuit appeals for lack of appellate jurisdiction. Petition at 7. Petitioners opposed, representing that their appeals would raise only issues within the regional circuit's jurisdiction. *Ibid.* The Tenth Circuit issued an order reserving judgment on the

motions to dismiss, referring the issue of appellate jurisdiction to the merits panel and setting a schedule for briefing on the merits. *Ibid.*

In the Federal Circuit, petitioners moved for an indefinite stay pending completion of the Tenth Circuit proceedings. Petition at 7. The DOE and Chevron opposed the stay on the ground that petitioners were forum shopping in order to avoid the circuit that decided *Consolidated Edison.*[11]

On June 14, 1999, the Federal Circuit denied petitioners' motions for stay and set a date for filing initial briefs on the merits. Federal Circuit Docket Entries, 99-1328, item 3.[12] Petitioners then sought review or reconsideration of the denial, and filed separate motions to suspend the effectiveness of the order denying stay. Federal Circuit Docket Entries, 99-1356, items 11, 16. By order of July 22, 1999, the Federal Circuit denied reconsideration of the denial of the stay, denied the motions to suspend the effectiveness of the June 14 order and set a new due date for initial briefs on August 12, 1999. *Id.*, items 11, 16 and 22. One day before their initial briefs were due in the Federal Circuit, petitioners notified the clerk by letter that they were withdrawing their appeals to that court. *Id.*, item 24. Respondents opposed the withdrawal unless the appeals were dismissed "with prejudice," pointing out that the practical effect of a

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[11] Opposition of Appellee United States Department of Energy to Motion of States of Alabama, et al., to Stay Further Proceedings, Federal Circuit, No. 99-1356; Opposition of Appellee Chevron U.S.A. Inc. to Motion of States of Alabama, et al., to Stay Further Proceedings, Federal Circuit, No. 99-1328.

[12] *See* listing of docket entries in Federal Circuit appeals 99-1328 (and consolidated case 99-1327) and 99-1356, Ex. 4 to Response of Appellee Chevron U.S.A. Inc. to Conditional Motion of Appellants, State of Alabama, et al., for Transfer Pursuant to 28 U.S.C. § 1631, filed Feb. 9, 2000 in Tenth Circuit appeals 99-3065 and 99-3066.

voluntary withdrawal without prejudice could be the equivalent of a stay and an evasion of the Federal Circuit's several orders denying a stay.

On August 31, 1999, the Federal Circuit issued its order on the motion to withdraw:

> The States of [Alabama, et al.] move to voluntarily withdraw appeal nos. 99-1328 and 99-1356. Chevron U.S.A. Inc. and the Department of Energy (DOE) oppose the motion unless the dismissal is "with prejudice". . . .
>
> This court earlier denied Alabama's motion for a stay of proceedings in this court pending completion of proceedings in the United States Court of Appeals for the 10th Circuit, and also denied Alabama's motion for reconsideration of that order. We note that the State of Delaware et al.'s appeal in no. 99-1327, consolidated with Alabama's appeal no. 99-1328, is proceeding.
>
> In light of these circumstances, any dismissal entered in appeal nos. 99-1328 and 99-1356 will be with prejudice. As Chev[r]on and DOE point out, if a dismissal is entered without prejudice, Alabama could, in the event of an adverse ruling by the 10th Circuit, seek to resurrect its appeal here by way of transfer. That would be an impermissible result, given our prior rulings and the fact that appeal no. 99-1327 is proceeding in this court.

Order, U.S. Court of Appeals for the Federal Circuit, Nos. 99-1327, 99-1328, 99-1356, August 31, 1999.

The Federal Circuit accordingly ordered that, "[a]bsent objection by Alabama within 10 days, the court will grant Alabama's motion to withdraw its appeals *and dismiss them with prejudice*." *Ibid.*, emphasis added. Petitioners' counsel then notified the Federal Circuit that petitioners had "no objection" to the dismissal with prejudice. Petition at 9, n. 15. On September 13, 1999 the Federal Circuit entered two orders dismissing appeals 99-1328 and 99-1356 "with prejudice," pursuant to the August 31, 1999 order.

No petition for rehearing or other form of relief from the dismissals was sought. The dismissals with prejudice are final.

In the meantime, briefing in the Tenth Circuit was completed on the merits. With petitioners' arguments at last laid bare, the Tenth Circuit on November 5, 1999 issued its Order and Judgment dismissing both of petitioners' appeals for lack of appellate jurisdiction. As amended upon denial of rehearing, the decision points out that petitioners had "carefully phrased" the issues to avoid any mention of the FSA, Petition Appendix at A-11, and engaged in "careful semantics," *ibid.*, but that the court would not "participate in the fiction that this dispute does not turn squarely on the ESA, the EPAA, and the FSA." *Id.* at A-13. The court concluded that to grant petitioners the relief they requested would require the court "to reject a Federal Circuit decision explicitly resting on those statutes, interpret and distinguish a paragraph of the FSA directly on point, and consider a defense implicating the FSA." *Id.* at A-13 to A-14, footnote omitted.[13]

The Tenth Circuit decision relied on TECA precedent that TECA's (now the Federal Circuit's) exclusive jurisdiction extends to issues that do not themselves arise under the EPAA when "'a meaningful ruling requires consideration of the issues as a whole, the construction of the EPAA will control the litigation, the issues are so commingled as to render separate treatment impractical, or

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[13] Under TECA precedents, as adopted by the Federal Circuit, interpretation and application of the FSA is an issue of law arising out of the laws and regulations concerning the ESA and is within the exclusive jurisdiction of TECA (and now the Federal Circuit). *In re Dept. of Energy Stripper Well Exemption Lit.*, 864 F.2d 796, 799 (Temp.Emer.Ct.App. 1988) (case seeking an interpretation of the FSA, to resolve dispute between signatories, held within TECA's exclusive jurisdiction). Petitioners did not contest in the court below that interpretation of the FSA is a matter within the Federal Circuit's exclusive jurisdiction.

the non-EPAA issues are subsidiary, preliminary or threshold to an EPAA issue.'" Petition Appendix at A-14, quoting *Phoenix Petroleum Co., supra,* 95 F.3d at 1563, and *Pennzoil Exploration and Production Co. v. Lujan*, 928 F.2d 1139, 1141 (Temp.Emer.Ct.App. 1991). The court concluded that the same was true

> when issues not otherwise relating to the FSA are so inextricably linked and subsidiary to the FSA claim that it would be both impractical and wasteful to consider those claims separately.

Petition Appendix at A-14.

The court concluded that petitioners' claims that do not on their face implicate the FSA "in fact are so secondary in relevance and importance to their FSA companions that they must fall within the Federal Circuit's exclusive jurisdiction." *Id.* at A-15.[14]

A petition for rehearing with suggestion for rehearing en banc was denied. *Id.* at A-2. While the petition for rehearing was pending, petitioners filed a conditional motion to transfer the appeals to the Federal Circuit under 28 U.S.C. § 1631. The court denied the motion for transfer, pointing out the Federal Circuit's August 31, 1999 order referring to dismissal of petitioners' earlier appeals "with prejudice" and petitioners' "ample opportunity to pursue these cases in the proper forum". Petition Appendix at A-15-16. The court concluded that it could not say that justice would be served by the transfer. *Ibid.*

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[14] The issues petitioners sought to raise in the Tenth Circuit included whether the district court erred in (a) declining to address arguments raised by petitioners for the first time in their reply brief, *see* Brief for Appellants in 99-3065 at 38, (b) concluding that its jurisdiction in M.D.L. 378 is limited to enforcement of the terms of the FSA, *id.* at 43, and (c) relying on *Consolidated Edison*. *Id.* at 21-38. In 99-3066, petitioners urged that the trial court's decision on standing was "fatally infected" by the *Consolidated Edison* approach. Brief for Appellants States of Alabama, et al., 99-3066, at 21.

REASONS WHY THE WRIT SHOULD BE DENIED

The Tenth Circuit's rejection of petitioners' "careful semantics" and its refusal "to participate in the fiction" that the case does not turn on the ESA/EPAA raise no issues warranting review by this Court. The circuit court's rulings are limited to the unique formulation of petitioners' arguments in their briefs. The petition's claim of important issues of judicial management in connection with allocation of jurisdiction, Petition at 13, does not live up to its promise. Petitioners simply disagree with the Tenth Circuit's ultimate determination that the issues petitioners sought to raise were not discrete and severable from the ESA/EPAA and FSA issues or were inextricably linked or subsidiary. Petitioners' disagreement with the decision is at most what this Court characterized as a "marginal jurisdictional dispute," *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 819 (1988), and one that is in regard to a statute from a prior era. In addition, the Tenth Circuit's decision does not conflict with any other decision of any court.

Petitioners now describe the case as one brought by "public officials seeking to vindicate public rights" under a "massive" settlement agreement. Petition at 11. This description tends to show the correctness of the Tenth Circuit's view that the case turns on the FSA, notwithstanding petitioners' care to avoid mention of the FSA in that court. *See* Petition Appendix at A-13. But the description is also misleading because the petition never addresses the detailed terms of the FSA that pertain specifically to enforcement of public rights:

> *Future DOE Actions.* With the sole exception set forth in Paragraph II.A.4, nothing in this Agreement shall be read or construed to limit or render reviewable the exercise of DOE's prosecutorial discretion in determining the appropriate action to take, if any, with regard to any enforcement matter. Further, nothing in this Agreement shall be read or construed to impose any obligation or duty upon the DOE regarding the

> enforcement or non-enforcement of its regulations, and it remains solely in the DOE's discretion to determine whether an enforcement proceeding should be initiated, settled, pursued on particular terms or terminated.

FSA, paragraph IV.A.2, 99-3065 App at 154.[15]

Similarly, FSA paragraph VI.B provides that the FSA shall not "create any right of action against DOE concerning the initiation, continuation or conduct of any litigation." Petition Appendix at C-13, quoting the FSA.

The above FSA provisions are entirely consistent with an unbroken line of decisions stating that enforcement of the ESA/EPAA regulations under § 209 of the ESA "is the exclusive right of the government."[16] Third parties, such as petitioners, have no right to challenge the results of a public enforcement proceeding. During the period of price controls and for nearly two decades thereafter, TECA and the Federal Circuit consistently distinguished between the public and private mechanisms for enforcing the regulations under §§ 209 and 210 of the ESA and "emphasized the independence of these separate statutory remedies, repeatedly cautioning against '[t]he commingling of private and agency enforcement devices for which Congress has made separate provision.'"[17]

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[15] The "sole exception" referred to in paragraph IV.A.2 pertains to DOE's waiving certain civil penalties against some of the parties to the FSA. The district court ruled this exception inapplicable to the dispute before the court. 99-3065 App at 283.

[16] *Consolidated Edison, supra*, 131 F.3d at 1478, quoting *Ashland Oil, Inc. v. United States Dep't of Energy*, 760 F.2d 298, 303 (Temp.Emer.Ct.App. 1985); *see also Getty Oil Co. v. Department of Energy*, 865 F.2d 270, 275-76 (Temp.Emer.Ct.App. 1988).

[17] *Consolidated Edison, supra*, 131 F.3d at 1478, quoting *Dyke v. Gulf Oil Corp.*, 601 F.2d 557, 567 (Temp.Emer.Ct.App. 1979).

Thus under both long-settled law and the express terms of the FSA, to which petitioners agreed, any suggestion that the case qualifies for review because petitioners seek to "vindicate public rights" rings hollow indeed.

Moreover, petitioners did not contest below and do not contest here that the issues whether third parties have rights to obtain review of a DOE decision not to issue a remedial order and whether the FSA confers such rights on these petitioners both arise under the ESA/EPAA and are thus both within the Federal Circuit's exclusive jurisdiction. No reason is shown for this Court, nearly 20 years after expiration of the EPAA, to reopen these settled issues.

Petitioners' further assertion, that the court of appeals ruled that petitioners' "voluntary withdrawal of a protective appeal in the Federal Circuit . . . precluded transfer to the latter court", Petition at 12, is disingenuous, to say the least. The Tenth Circuit did not announce a rule that a transfer would be denied simply because of a withdrawal of a protective appeal. Petitioners sought and accepted a dismissal "with prejudice" of their appeals in the Federal Circuit *after* that court had explained why such dismissal would be "with prejudice" and after it ruled that to resurrect their appeal by way of transfer from the Tenth Circuit would be "impermissible." Petition Appendix at A-17. Petitioners' agreement to the Federal Circuit's dismissal "with prejudice," if it does not judicially estop petitioners from now seeking a transfer of the Tenth Circuit appeals, at the very least justifies a conclusion that transfer is not in the interest of justice. The Tenth Circuit correctly referred to petitioners' "ample opportunity to pursue these cases in the proper forum." Petition Appendix at A-17 to A-18. The issues claimed to be raised by the petition are thus not presented on the facts of his case.

There is also no conflict with *Atlantic Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771 (D.C.Cir. 1984). The issue in *Atlantic Richfield* was whether, under § 503 of the

Department of Energy Organization Act ("DOEOA"),[18] the Secretary of Energy has adjudicatory power in regard to the issuance of remedial orders. The *Atlantic Richfield* action was brought by the recipient of a remedial order to set aside an administrative levy of discovery sanctions imposed by the OHA under authority delegated from the Secretary. In this case, petitioners are third parties who seek to challenge, as a violation of the FSA, a DOE decision *not* to issue a remedial order. The Tenth Circuit concluded that petitioners' right to review the DOE decision on a motion to enforce the FSA directly involves the ESA, the EPAA and the FSA itself and is within the exclusive jurisdiction of the Federal Circuit. Petition Appendix at A-12 to A-14. Neither *Atlantic Richfield*, nor any other decision, is to the contrary.[19]

Petitioners do claim an inconsistency between certain language in *Consolidated Edison* and *Atlantic Richfield* relating to the legislative history of § 503 of the DOEOA and whether the Secretary has adjudicative as well as prosecutorial powers in regard to remedial orders. Petition at 17 & n. 20. Petitioners' disappointment that the Tenth Circuit would not review *Consolidated Edison* on that point is not a reason for this Court to review the decision that the issues on this appeal are for the Federal Circuit. Whether *Consolidated Edison* is right or wrong on that point would not change the outcome in that case that third parties may not insist that public enforcement proceedings be brought under the ESA/EPAA, or the Tenth Circuit's decision that exclusive jurisdiction to review the district court's actions is

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[18] 42 U.S.C. § 7193 (1997).

[19] It is significant that, though the district court ruled in the original action brought by petitioners (96-1180) that petitioners lacked standing to challenge the OHA decision on non-FSA grounds, citing *Consolidated Edison*, the petition nowhere challenges that determination or the Tenth Circuit's ruling that the standing issue is within the exclusive jurisdiction of the Federal Circuit.

in the Federal Circuit. As noted above, n. 19 ante, the petition raises no issue as to petitioners' standing to challenge the DOE action on grounds not based on the FSA. And in view of the FSA's provisions that nothing in the FSA shall be construed to impose a duty on DOE in regard to enforcement matters, petitioners' disagreement with *Consolidated Edison*, is beside the point.

I. THERE IS NO UNSETTLED ISSUE AS TO ALLOCATION OF JURISDICTION AMONG THE CIRCUIT COURTS. THE TENTH CIRCUIT SIMPLY HELD THAT PETITIONERS' APPEAL PRESENTS ISSUES UNDER THE ESA, THE EPAA AND THE FSA.

The district court's ruling denying petitioners' motion to enforce the FSA in M.D.L. 378 determined that there was no violation of the FSA. The court reasoned that the DOE decision not to issue a remedial order was an exercise of prosecutorial discretion and unreviewable (citing *Consolidated Edison*) and that the FSA itself specifically preserves the DOE's discretion and "shields it from review." Petition Appendix at C-9 to C-12. In the companion case brought by petitioners, No. 96-1180, the district court held, based on *Consolidated Edison*, that petitioners lacked standing to sue on their claims *not* based on the FSA. It has been long settled, and was not disputed below, that, on an appeal, the merits of the district court's rulings that the FSA was not breached and that petitioners lacked standing to sue on the non-FSA claims would be issues within the exclusive jurisdiction of the Federal Circuit.[20]

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[20] *See In re Dept. of Energy Stripper Well Exemption Lit.*, 864 F.2d 796, 799 (Temp.Emer.Ct.App. 1988) (interpretation of the FSA held within TECA's exclusive jurisdiction); *Consolidated Edison, supra*, 131 F.3d 1478-1480 (right of third parties to challenge DOE enforcement decisions held to turn on a construction of §§ 209-211 of the ESA).

In an effort to avoid the Federal Circuit, petitioners contended vehemently in the Tenth Circuit that the district court had ruled that it "lacked jurisdiction" to hear and decide the claims under the FSA, because its opinion stated that the DOE decision not to issue a remedial order was part of the prosecutorial function of the Secretary of Energy and unreviewable. *See, e.g.,* Brief for Appellants States of Alabama, et al., in No. 99-3065 at 14, 18-19. Petitioners further contended that the reviewability of the DOE decision was an issue arising solely under the DOEOA, and within the jurisdiction of the Tenth Circuit.

It is highly improbable that the district court, in the context of the motion to enforce the FSA, concluded that it lacked jurisdiction, however the court may have viewed the reviewability of the DOE decision in the absence of the FSA: (1) the district court in fact had jurisdiction to interpret the FSA under ESA § 211 and the reservation of jurisdiction in the *Stripper Well* case, 653 F.Supp. 108, 121 (D.Kan. 1986), as petitioners acknowledge, (2) no party suggested that the district court lacked jurisdiction, (3) the district court's opinion stated that its jurisdiction in M.D.L. 378 was "limited to enforcement of the terms of the FSA," Petition Appendix at C-3, (4) the district court ruled on the FSA claims on the merits and in detail, and (5) the district court's order of dismissal in No. 96-1180 was based on "failure to state a claim" as to the FSA claims, and lack of standing as to the other claims, with no suggestion of a lack of jurisdiction. *See* 99-3066 App at 220.

The Tenth Circuit nonetheless accepted petitioners' contention that the district court ruled that it lacked jurisdiction. Petition Appendix at A-12. But the Tenth Circuit correctly rejected petitioners' argument that reviewability of the DOE decision turned solely on the DOEOA; notwithstanding petitioners' "careful semantics," Petition Appendix at 11, there were no issues discrete and severable from the ESA/EPAA issues:

> . . . [D]etermining whether the OHA's decision in this case is properly reviewable would require this court to

> consider issues arising both under the ESA and EPAA directly and under the FSA. The district court based its ruling that the decision was not reviewable on Consolidated Edison Co. v. O'Leary, 131 F.3d 1475 (Fed.Cir. 1997), and the States ask us to reject this authority. (*See* States' 99-3065 Br. at 27-29.) However, even a brief glance at that case reveals that the Federal Circuit relied heavily on interpretation of ESA/EPAA issues to reach its result. *See* O'Leary, 131 F.3d at 1478 ("Four statutes are pertinent to this issue: sections 209, 210, and 211 of the ESA, which were incorporated into the EPAA, and section 503 of the Department of Energy Organization Act (DOEOA)."). The States would have us focus only on whether the DOEOA precludes review of the OHA's decision, but it is clear that the case relied upon by the district court to dismiss the States' claims involved the ESA and EPAA. As such this claim clearly arises under those statutes.

Petition Appendix at A-12.

The Tenth Circuit also recognized (as had the district court) that it could not rule on the reviewability of the OHA decision under the FSA without considering the effect of paragraph IV.A.2 of the FSA (set forth at page 11-12 ante):

> We are at a loss to see how the issue presented to this court could be decided without reference to this highly probative provision of the agreement underlying this dispute. (*See* also FSA ¶ VI.B. ("[The FSA] shall not create any right of action against DOE concerning the initiation, continuation or conduct of any litigation.").)
>
> . . . . .
>
> This court declines to participate in the fiction that this dispute does not turn squarely on the ESA, the EPAA, and the FSA. In order to grant the relief sought by the States, we would have to conduct inquiries specifically committed to the expertise of the Federal Circuit. Specifically, we would have to reject a Federal Circuit

> decision explicitly resting on those statutes, interpret and distinguish a paragraph of the FSA directly on point, and consider a defense implicating the FSA.

Petition Appendix at A-13 to A-14, footnote omitted.

The petition claims that this Court's intervention is needed to provide guidance "for this and similar cases." Petition at 14. But the issues created by petitioners' extensive efforts to avoid the proper forum are without doubt unique to this litigation. In any event, they are fact-bound and relate to a statutory scheme that expired nearly two decades ago. Review by the Court could require examination of records in two circuit courts on questions of fact and the parties' articulation of legal issues that can be of no importance to any other litigant.

II. PETITIONERS DID NOT RAISE AN ABSTENTION ISSUE BELOW AND THE TENTH CIRCUIT DECIDED NO ISSUE INVOLVING ABSTENTION.

The petition's strained suggestion that the Tenth Circuit found that it had jurisdiction and failed to follow established rules of abstention, Petition at 20-23, is wholly outside the issues created by the rulings below.

First, petitioners never raised any issue concerning abstention in the court of appeals; the issue is raised for the first time in the petition for certiorari.

In addition, the court of appeals did not apply any rules of abstention. Rather, the court, after considering full briefing on both its jurisdiction and the merits, ruled that the appeal turns squarely on the ESA, the EPAA and the FSA, and declined to participate in the "fiction" that it is otherwise. Petition Appendix at A-13. The court also held that the secondary issues raised by petitioners are "so inextricably linked and subsidiary to the FSA claim that it would be both impractical and wasteful" to consider them separately and are "so secondary in relevance and importance . . . that they must fall within the Federal

Circuit's *exclusive* jurisdiction." Petition Appendix at A-14 to A-15, emphasis added.

Thus, the claimed conflict with this Court's abstention rules does not exist and Question II stated by the petition is not presented.

III. THE TENTH CIRCUIT'S HOLDING THAT TRANSFER OF THE APPEALS TO THE FEDERAL CIRCUIT IS NOT IN THE INTEREST OF JUSTICE TURNS UPON THE UNIQUE FACTS OF THIS CASE AND RAISES NO IMPORTANT QUESTION FOR SETTLEMENT BY THIS COURT.

Question 3 presented in the petition is whether the interest of justice standard in the Transfer Statute, 28 U.S.C. § 1631, can be applied "to exclude appellant states from all appellate forums because they declined to proceed on the merits in two courts simultaneously." But the Tenth Circuit did not decide that issue.

Rather, the Tenth Circuit appears to have viewed petitioners' request for transfer as flouting the Federal Circuit's order dismissing petitioners' appeals to that Court "with prejudice." The Tenth Circuit particularly noted the Federal Circuit's August 31, 1999 Order stating that to "resurrect [the] appeal here by way of transfer" would be "impermissible." Petition Appendix at A-17, quoting Order, U.S. Court of Appeals for the Federal Circuit, Nos. 99-1327, 99-1328, 99-1356, August 31, 1999. Counsel for petitioners, after receiving the Federal Circuit's order, advised the Federal Circuit that petitioners had "no objection" to the dismissal "with prejudice." Petition at 9, n. 15. The Tenth Circuit also noted that petitioners had "ample opportunity" to pursue the appeals in the proper forum. Petition Appendix at A-17 to A-18.[21]

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[21] As pointed out in *Coleman v. U.S.*, 106 F.3d 339 (10th Cir. 1997), a case relied upon by petitioners, the Congress

(footnote continued)

The petition challenges, for the first time, the Federal Circuit's order of dismissal "with prejudice." Petition at 26, notes 26, 27. Petitioners never preserved this issue for this Court. They agreed to the Federal Circuit's dismissal of their appeals "with prejudice," knowing exactly what the Federal Circuit intended. Likewise, petitioners' quibbling with the meaning of the term "with prejudice," Petition at 22, and labeling the material portions of the Federal Circuit's August 31 order as "non-precedential" or "dicta", Petition at 8, 9, 25, obscure the point. Petitioners do not claim that they did not understand what the Federal Circuit intended. "Whatsoever a man soweth, that shall he also reap."[22]

The Tenth Circuit panel was fully aware of the burden imposed on respondents and two circuit courts by petitioners' insistence on appealing to the Tenth Circuit. In the circumstances of this case, both circuit courts would have been justified in concluding that petitioners were engaged in forum shopping to avoid the court that decided *Consolidated Edison*. Forum shopping "requires courts to squander public resources in adjudicating the propriety of manipulative efforts to gain access" to a particular forum. *Cummings v. United States*, 648 F.2d 289, 290 (5th Cir. 1981). The legislative history of § 1631 spells out that Congress was concerned with avoiding appellate forum shopping. S. Rept. 97-275, pp. 5, 19-20, *reprinted in* 2 1982 U.S.C.C.A.N. 15, 29-30. While that concern was expressed primarily in regard to patent claims, it was not limited to patent claims. *Atari, Inc. JS&A Group, Inc.*,

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contemplated that § 1631 would aid litigants "who were confused about the proper forum for review." *Id.* at 341, quoting *Liriano v. United States*, 95 F.3d 119, 122 (2d Cir. 1996), internal quotation marks omitted. Petitioners do not claim that they were "confused" about the proper forum or that they erroneously selected the wrong forum.

[22] Galations 6, 7.

747 F.2d 1422, 1437 (Fed.Cir. 1984), *overruled on other grounds in Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed.Cir. 1998). A Congress determined not to create forum shopping opportunities would scarcely regard a transfer under § 1631 as in the interest of justice where the request for transfer results from forum shopping.

Finally, the assertion in the petition that the order denying transfer conflicts with *Christianson v. Colt Industries Operating Corp., supra*, 486 U.S. 800, Petition at 25, is unfounded. Whether, had the Tenth Circuit transferred the appeals, the Federal Circuit would have been required to treat the transfer decision as the "law of the case," *ibid.*, is nowhere presented on the facts here, since the Tenth Circuit ruled it was not in the interest of justice to order the transfer. There is similarly no issue whether the Federal Circuit's order of dismissal was intended to preclude a sister circuit's transfer. The issue, rather, is whether the Tenth Circuit could have concluded in all the circumstances that the interest of justice is not served by transferring these particular appeals. Denial of the transfer was indicated where petitioners were not simply seeking a second bite at the apple. They had had that second bite and were seeking yet another.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 2000

(4)

NO. 99-1952

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, AND WYOMING,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY AND CHEVRON U.S.A. INC.,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

The States of Alabama, et al., ("States") respectfully submit that the briefs in opposition of the Department of Energy ("DOE Opp.") and Chevron U.S.A. Inc. ("Chev. Opp.") provide no serious rebuttal to Petitioners' showing that this Court should exercise its supervisory power to prevent termination of this important public interest case without any appellate review.

I. Respondents' Arguments Fail to Rebut the Petition's Showings That the Issue Appealed Is Separable and Within Tenth Circuit Jurisdiction, There Is No Bar to Exercise of That Jurisdiction, and There Is No Basis for Abstention.

A. This Case Is Not "Factbound" or Unimportant to Other Litigants as Respondents Suggest: the Court Should Make Clear That Those Seeking Justice in the Federal Courts Must Be Heard in Courts of General Jurisdiction Unless Barred by Congress or this Court. Here no statute, no precedent and no compelling reason prevents the Tenth Circuit, especially after accepting the States' Steel[1] argument, from simply deciding the issue brought to it: should the DOE (and Chevron) be able to evade review of an asserted breach of a solemn court-approved contract with all 50 states by hiding behind an erroneous district court reading of a statute within the regional circuit's purview? The Tenth Circuit should have answered that question, especially since DOE's view of the statute has always been opposite to that of the district court.

B. The Suggestion That Steel Does Not Apply to a Dismissal for Unreviewability Is Not Supported by Any Authority, and Steel Leaves the "Prosecutorial Discretion" Issue as the Only Issue Required to Be Decided. The States' appeal made two pivotal contentions: (1) that this Court's Steel ruling precluded the district court from going further once it determined, under the DOE Act, that the contested Office of Hearings and Appeals ("OHA") decision was unreviewable as prosecutorial discretion; and (2) that the only basis for that determination was an erroneous reading of

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[1] Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

the DOE Act contradicted by the text and legislative history of the DOE Act, by 20 years of agency interpretation, and by ARCO.[2]

Respondents provided adjectives ("contrived," "meritless"), but no authority in attacking the Steel point below. Ultimately, the Tenth Circuit agreed with the States on Steel, ruling that the district court should have stopped once it decided that it lacked jurisdiction over the case. Because "Steel rejected the use of so-called 'hypothetical jurisdiction' to reach the merits of a case, and a jurisdictional dismissal is all that is necessary to the holding," the rest of the district court's decision was dicta. Pet. App. A-12. Now, without mentioning or analyzing Steel, or citing any case, Chevron implies (Chev. Opp. at 16) that the Tenth Circuit erred in applying Steel, because the district court dismissed for "unreviewability," not lack of jurisdiction. But, as the States' brief below (99-3065 at p.34 & n. 33) explained (with citations), for Steel purposes at least, unreviewability is jurisdictional. Thus the Tenth Circuit was correct in vitiating the rest of the district court's opinion, leaving only its unreviewability ruling based on the DOE Act, a law not assigned to the Federal Circuit, for the appeal.

The application of Steel thus negates Respondents' central contention, that the Tenth Circuit lacks jurisdiction here because of potential Federal Circuit issues in the appeal. For the Federal Circuit and TECA decisions make clear that the specialized court's exclusive jurisdiction does not attach unless resolution of the case required application of a statute assigned to the specialized court *and* "'the ...[specialized court] issue must have been adjudicated in the district court.'" Phoenix Petroleum Co. v. FERC, 95 F.3d 1555, 1563 (Fed. Cir. 1996); quoting Texas American Oil Corp. v. DOE, 44 F.3d 1557, 1563 (Fed. Cir. 1995); *see also* ARCO, 769 F. 2d at 779 ("... decided by the district court on that basis"). The Tenth Circuit's fear of lurking Federal Circuit issues in the appeal (for which, as shown below, Respondents provide no support) does not create Federal Circuit jurisdiction, since these issues were simply

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[2] Atlantic Richfield Co. v. DOE, 769 F.2d 771(D.C. Cir.1984).

not "adjudicated in the District Court" once Steel was applied.

C. The Argument That the Tenth Circuit's Decision Does Not Conflict with the D.C. Circuit's ARCO Decision Is Plainly Wrong. From 1984 to 1999 no one questioned the ARCO ruling that the nature of OHA's function under the DOE Act in Remedial Order cases is a discrete, separable issue within regional circuit jurisdiction, even though the substance of Remedial Orders is governed by statutes under the specialized jurisdiction.[3] The Tenth Circuit's decision that it cannot decide precisely the same issue is thus in direct conflict with ARCO. On the merits of the DOE Act issue, ARCO decided that the Act does not limit OHA to prosecutorial functions in Remedial Order cases, but permits it to have the adjudicatory function delegated to it and exercised both in that case and here. Thus, the district court's decision, that the DOE Act restricts OHA to prosecutorial functions, directly conflicts with ARCO, as does the Tenth Circuit's decision to let that holding stand. Chevron argues (Opp. 13-14; *see also* DOE Opp. at 10 n.5) that the limitation of OHA to prosecutorial functions was asserted in ARCO to nullify OHA's discovery powers, while it is asserted here to deny reviewability. That distinction does not alter the basic question or the jurisdiction to answer it. In both cases, the decision actually turned on whether OHA may act as an adjudicator or is limited to a prosecutorial role under the DOE Act.

D. Respondents' Argument That There Are Three Lurking Federal Circuit Issues Is Both Legally and Factually Deficient. Respondents lean heavily on the Tenth Circuit's assertion that in addition to the DOE Act issue, it would also have to decide three Federal Circuit issues. The Petition and discussion above show that this argument is legally deficient, first, because to the extent that these issues were addressed by the district court, they were eliminated by Steel, and Federal Circuit jurisdiction extends only

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[3] See 769 F.2d at 778-80. Respondents rely heavily on Consolidated Edison v. O'Leary, 131 F.3d 1475 (Fed. Cir. 1997)("Con Ed"), but that case, too, on the page cited by the district court (131 F. 3d at 1481), decided the DOE Act issue as a separate matter, without reference to the ESA/EPAA.

to issues "adjudicated in the district court," and second, because the DOE Act issue is, under ARCO, severable. The Petition (p.19 n.23) also showed specifically that the asserted Federal Circuit issues are not in fact present, because (1) the prosecutorial discretion holding of the district court relied only on the DOE Act analysis and no other holdings in Con Ed;[4] (2) on its face FSA §IV.A.2 merely preserves existing prosecutorial discretion, and, since it does not determine OHA's role, is irrelevant here; and (3) Chevron's supposed ESA defense is in fact a DOE Act defense. Respondents' Oppositions fail to rebut these specific showings.

E. The Argument That the Regional Circuits Are Precluded from Ever Considering Issues over Which the Specialized Court Might Assert Ancillary Jurisdiction Is Absurd. DOE claims that because the Federal Circuit decided the DOE Act issue in Con Ed, and (in an unpublished, non-citable order[5]) rejected a suggestion that it lacked jurisdiction to do so, "the Federal Circuit considered

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[4] The district court did not apply the standing discussions in Con Ed to dismiss the States' FSA claim, because the court apparently recognized that, unlike the Con Ed plaintiffs, the States, as parties to the FSA, had conceded standing to enforce it. *See* Chev. Opp. 5 (standing uncontested on FSA claim).

[5] While not wishing to complicate the decision on this Petition, the States feel compelled to request the Court to strike and/or ignore references in the Oppositions, DOE Opp. at 3-4 and 11-12, n.7; Chev. Opp. at 1, to the Federal Circuit's unpublished, uncitable order of March 25, 1998, and impose whatever other remedies it may deem appropriate to enforce Fed. Cir. Rule 47.6(b). That order bore the legend, "... this disposition is not citable as precedent," and that warning was reiterated in the very listing of orders in the West volume cited by Chevron. *See*, Decisions without Published Opinions, 152 F.3d 938 & 945 (Fed. Cir. 1998). More disturbing, neither respondent disclosed to this Court that on May 22, 1998, DOE had asked the Federal Circuit to change the unpublished, uncitable status of the order for the explicit purpose of using the order in the cases below here, that the States opposed that motion, and that the motion was denied by the Federal Circuit on June 3, 1998. (Copies provided to the Clerk.) To the States' knowledge, neither the Federal Circuit, nor (assuming it could) the Tenth Circuit, nor this Court has granted Respondents permission to cite or use the uncitable order. [If this material is struck, the text herein referring to it should also be struck].

petitioners' claims under the DOEOA to be within the Federal Circuit's exclusive jurisdiction." DOE Opp. at 11-12, n.7. That claim is belied by the order itself. The Federal Circuit merely stated that its assigned authority "permits us to construe other statutes when necessary to resolve the ESA/EPAA issue raised on appeal." *See* DOE Opp. at 4. It did not suggest that the regional circuits, which have primary jurisdiction over the DOE Act, are precluded from deciding DOE Act issues appealed to them.

Con Ed decided a DOE Act issue as an exercise of "ancillary" jurisdiction to decide non-assigned issues subsidiary to the primary specialized issue appealed. *See* Phoenix Petroleum, 95 F.3d at 1563 (TECA could "consider and apply laws in interaction with the EPAA/ESA *in the course of deciding the issue before the court*") (emphasis supplied). Where, as here, no primary ESA/EPAA issue is appealed to which the DOE Act issue could be ancillary, jurisdiction over the regional circuit issue remains in the regional circuits. The suggestion that a DOE Act issue must always be heard by the Federal Circuit, simply because it was addressed by that court in another case as ancillary to ESA issues raised in that appeal, is absurd. Such a rule would transfer large portions of federal authority from the general courts to the specialized courts without logical basis and without congressional authority, in violation of this Court's clear direction that only Congress can "invest ... or withhold" jurisdiction from federal courts. *See* Petition at 15.

Chevron's description of the Tenth Circuit opinion suggests that the court relied on the Federal Circuit's "ancillary" jurisdiction to disclaim jurisdiction over the entire appeals here, including the DOE Act issue. *See* Chev. Opp. at 9-10. In fact, rather than suggesting that the DOE Act issue was "'inextricably linked and subsidiary to the FSA issue,'" *id.*, the Tenth Circuit opinion could not be clearer that it relied on the Federal Circuit's "ancillary" jurisdiction only to reject jurisdiction over the other, non-DOE Act procedural challenges raised by the States. Pet. Appendix A-14. The court determined that the "subsidiary" issues, although not

themselves within the specialized jurisdiction, should be decided in the Federal Circuit along with the primary reviewability issue. *Id.*[6] This holding in no way suggests that the DOE Act issue somehow falls under the Federal Circuit's ancillary jurisdiction.

F. The Cases Cited by Chevron Do Not Raise Issues Required to Be Decided in this Appeal. The question raised in this appeal was whether the District Court erred in deciding that OHA exercises only prosecutorial discretion under the DOE Act. The cases cited by Chevron, relied upon in Con Ed in denying standing to non-signatories to the FSA, Chev. Opp. at 12 and nn. 16 &17, were not, as discussed above, related to Con Ed's DOE Act holding, or to the issues here. Their facts are wholly inapplicable here. One involves an attempt to enforce a remedial order after it was superseded by a settlement agreement with DOE, thus presenting a challenge to an exercise of prosecutorial discretion, which would not be relevant here if OHA's decision is adjudicatory. Ashland Oil, Inc. v. DOE, 760 F.2d 298 (TECA 1985). Another involves an attempt to force DOE to enter a private damages action. Dyke v. Gulf Oil Corp., 601 F.2d 557, 567 (TECA 1979). Of course there is no such action here. The third relates to intervention rights of some of the Con Ed parties, and not only pointed to their status as non-parties to the FSA, but was a case where the court allowed the States, as FSA parties, to intervene in the enforcement case with the approval of DOE. *See*, Getty Oil Co. v. DOE, 865 F.2d 270 (TECA 1988); Getty Oil Co. v. DOE, 117 F.R.D. 540, 549-50 (D. Del. 1987).

G. The Failure to Meet Abstention Standards Did Not Arise until the Tenth Circuit Declined to Exercise Jurisdiction, While Eliminating Any Adequate Alternative Forum by Refusing Transfer. DOE ignores the abstention issue, and thus presumably concedes that if de facto abstention is present, this Court's abstention standards are not met. Chevron's only response is that the issue was not raised below. But this is not an issue which could

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[6] If the primary unreviewability holding were found to belong in the Tenth Circuit, then, of course, there would be no reason for these non-assigned issues to be decided by the Federal Circuit.

have been asserted below. It first arose when the Tenth Circuit's "clarified" second opinion, agreeing that Steel limited the case to the DOE Act-based reviewability ruling, nevertheless refused to address that ruling, and yet declined to transfer the case to the Federal Circuit. Only then was it clear that the court was voluntarily abstaining from exercising jurisdiction. And only then was it apparent that there could not be any alternative forum -- much less an adequate alternative forum -- to defer to.

II. Claims of "Forum-Shopping" And "Discretion" Are Not Adequate Responses to the Tenth Circuit's Serious Misuse of the Transfer Statute to Terminate a Case Because, Before Issue Was Joined, a Protective Appeal Was Withdrawn in Order to Avoid Proceeding in Two Courts at Once.

Had the States appealed only in the Tenth Circuit, transfer would have been routine once jurisdiction was denied. Petitioners in good faith chose a court which, after issue was joined on the merits, ultimately decided that jurisdiction lay elsewhere, thus meeting the standards for application of 28 U.S.C. §1631. Yet, Respondents claim that the States' filing of protective appeals somehow justified the denial of transfer. Respondents' arguments ignore the case law both before and after the passage of §1631 endorsing the filing of protective notices when there is doubt as to jurisdiction between the regional circuits and the Federal Circuit under 28 U.S.C. §1295(a). *See*, Pet. at 7, n.11. Moreover, withdrawal of a protective notice, to avoid simultaneous proceedings on the same matter in two courts, precisely implements Congress' goal in enacting the Transfer Statute. By no means did Congress intend or expect that such a withdrawal -- intended to avoid duplicate litigation -- would be the basis for denying transfer under a statute with the same purpose.

Respondents ignore this basic defect in the Tenth Circuit's unprecedented application of the "interest of justice" standard. DOE merely recites the court's position without defending it. Chevron insinuates that the States' case deserved a death penalty to punish the selection of the Tenth Circuit for the principal appeals

and the withdrawal of the protective appeals. Chevron arrives at the view that these actions were part of an improper forum-shopping scheme by ignoring the single most relevant date in its otherwise exhaustive chronology: on June 30, 1999, after full briefing on the jurisdictional issues, the Tenth Circuit, for all intents and purposes, took jurisdiction of the primary appeals by declining summary dismissal, referring the jurisdictional issue to the merits panel, and ordering briefing and oral argument on the merits. At that point, the States could reasonably expect that the Federal Circuit would avoid duplicative proceedings by granting the pending request for a stay of the protective appeals. Instead, that court denied the stay and also ordered briefing on the merits simultaneously with the Tenth Circuit briefing. Thus, the States had the choice of proceeding to the merits in both courts, or withdrawing the protective notices and proceeding in the court the States believed had primary jurisdiction over the issues they sought to raise. Of course, in precisely this circumstance, the Transfer Statute was intended to encourage and protect the choice of a single court even if that choice turns out to be wrong. The States' actions were not underhanded; they were not "forum shopping;" rather, they *decreased* the "burdens imposed on" the parties and the courts. Chev. Opp. at 20. In short they were very much in the interest of justice, as contemplated by Congress.[7]

Chevron's implication that the States' choice of the Tenth Circuit had no substantial basis is contradicted by the Tenth Circuit's denial of summary dismissal. More importantly, the States had (and still have) every reason to believe that Steel would eliminate the merits issues and leave only the DOE Act prosecutorial discretion issue, a regional circuit issue. In fact, the Tenth Circuit ultimately applied Steel to eliminate the merits issues.

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[7] Chevron's discussion of Congress' view of forum shopping misses the point. The legislative history of § 1631 in fact shows that Congress' remedy for inappropriate forum shopping was to facilitate quick transfer of the case to another court. *See*, 127 Cong. Rec. 20849, 29868 (Dec. 8, 1981) (remarks of Senator Specter).

Respondents cite no case requiring the States to anticipate -- at their peril -- that, even after accepting the States' Steel argument and disclaiming its earlier reliance on the District Court's merits discussions to refuse jurisdiction, the Tenth Circuit would nevertheless rule that the potential presence of unappealed ESA issues in the case precluded it from acting at all, even as to issues within its jurisdiction.

The Respondents contend it was within the court's discretion to rely upon the Federal Circuit's grant of voluntary dismissal "with prejudice," and that the States did not preserve their objections on this issue. But they do not refute Petitioners' showings (Pet. at 25-26 & nn.26-27) (a) that the Federal Circuit did not dismiss the States' protective appeals involuntarily, but in fact denied Chevron's motion to do so, and instead granted the States' request for voluntary dismissal,[8] (b) that voluntary dismissals may not be conditioned upon a preclusion of a later transfer, (c) that the Federal Circuit had no authority to rule on the issue of transfer, which was not before it, had not been briefed, and in any event is a decision assigned to the transferor court, (d) that dismissals without adjudication of the merits do not bar later actions on the same claims, regardless of the label "with prejudice," and (e) that, even if preservation of the issue were necessary, the States' letter accepting voluntary dismissal "with prejudice" preserved the transfer issue by acceding only to the ordering language, which did not mention transfer, and by doing so "[w]ithout forgoing any other rights or objections they may have in these or any other proceedings."[9]

In sum, the denial of transfer here, resulting in the denial of any forum for the appeal of a case by public officials for public benefit, commands this Court's intervention to prevent a total frustration of Congressional intent and a total perversion of the interest of justice standard.

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[8] DOE Opp., Appendix A at 4a.

[9] DOE Opp., Appendix B at 6a.

CONCLUSION

For the reasons stated herein and in the Petition, the Petition should be granted with respect to both cases below.[10]

Respectfully submitted,

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[10] Chevron implies that there is some ambiguity about the States' intention that the Petition cover Tenth Circuit Docket No. 99-3066. As the Petition makes clear, a reversal of the jurisdictional ruling in 99-3065 would require reversal of 99-3066, in which the court adopts "the same reasons" as it applied in 99-3065. Pet. App. at A-15. Moreover, if this Court rules the Tenth Circuit has jurisdiction over the DOE Act issue, and that court on remand reverses the district court's "prosecutorial discretion" holding, then the Tenth Circuit would have to reconsider all rulings in both cases dependent on the DOE Act ruling. For example, if the dismissed FSA claim is ruled viable, then the court must consider anew the States' assertion that no separate standing analysis is needed for the 99-3066 non-FSA claims, which are part of the same case or controversy as the FSA claims.

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Supreme Court, U.S.
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No. 99-1952

IN THE

Supreme Court of the United States

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN AND WYOMING,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY AND CHEVRON U.S.A. INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL ASSOCIATION OF STATE ENERGY OFFICIALS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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5 pp

WRITTEN CONSENT OF THE PARTIES

Pursuant to Rule 37(2)(a), submitted separately today are the original, written consents of all parties consenting to the filing of a brief amicus curiae. The parties include the Respondents, the United States and Chevron U.S.A., Inc., and Petitioners, the several states.

INTEREST OF THE AMICUS CURIAE

The National Association of State Energy Officials ("NASEO") is a 501(c)(3) organization incorporated in Washington, D.C., in 1986.[1/] NASEO executed an agreement to adhere to policies of the National Governors' Association. NASEO represents, and includes as full voting members, representatives of the energy offices in all the states, territories and the District of Columbia and excludes the Commonwealth of Virginia. NASEO is dedicated to supporting a balanced national energy policy, including support for a diversity of demand and supply-side resources. NASEO works with its members to share good programs and to educate other state and federal policy makers on positive energy ideas.

NASEO is extremely interested in the outcome of this case because if any oil overcharge refunds are provided, then the States will distribute a large proportion of the refunds to good uses to assist consumers, including low-income consumers.

SUMMARY OF THE ARGUMENT

NASEO adopts the legal arguments advanced by the Petitioners, the several states. Review of this case is warranted so that public officials can vindicate public rights. To deny Petitioners would deny a forum for this important case, thus

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[1/] Pursuant to Rule 37(6), this brief was authored by Kathleen Mazure, Jeffrey C. Genzer and Sean M. Neal, counsel to NASEO. No persons or entities, other than NASEO and its members, made a monetary contribution to the preparation or submission of this brief.

decimating the purpose of the Transfer Statute. If oil overcharge refunds were to be recovered in this case, the States, represented, in part, by NASEO members, would expend these funds to support such important activities as fuel assistance for the poor, weatherization programs to improve the energy efficiency of the homes of low-income Americans and other important energy conservation activities. In an era of high, and extremely volatile, oil, heating oil, natural gas and electricity prices, such programs are especially critical.

ARGUMENT

NASEO adopts the substantive legal arguments of the Petitioners, the States of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin and Wyoming, presented through their respective Attorneys General. The Petitioners are attempting to enforce the terms of the 1986 Final Settlement Agreement ("FSA") among all the States, the federal government and virtually the entire oil industry, including respondent Chevron U.S.A., Inc. Without review by the Court, the States would have no recourse to recover hundreds of millions of dollars to assist energy consumers in the United States.

Since the early 1980s, billions of dollars have been returned to energy consumers within the United States as a result of oil overcharge refund cases, of the type represented by this matter.[2/] NASEO members have distributed these funds to extraordinarily worthy causes during the past two decades. These refunds have helped respond to the high cost of energy. We are in a period of extremely high and volatile, oil prices which has negative ripple effects throughout the entire

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[2/] *See, e.g., In re Department of Energy Stripper Well Exemption Litigation,* 880 F. Supp. 1466 (D. Kan. 1995).

economy. United States' energy consumers are at great risk. The funds recovered through this case would be extremely critical.

Oil overcharge refunds have been used, and would be used, for critical public purposes. The Low-Income Home Energy Assistance Program ("LIHEAP") provides funds to the poor, elderly and disabled to help fund their heating and cooling costs. These extremely poor Americans frequently have to choose between heating, cooling or eating. The Low-Income Weatherization Assistance program helps the poor by adding energy efficiency measures to their homes, which generally reduces average annual residential energy use by twenty-three percent. Other funds have been utilized to reduce energy costs for all other Americans, promote alternative fuels, help farmers and small businesses and generally to benefit all American consumers. There is no substitute for these refunds. They will help all Americans.

CONCLUSION

For the reasons stated herein, and in the Petition for Writ of Certiorari, the Writ should be granted with respect to each of the questions presented in the Petition, and, if appropriate, the decisions below dismissing the appeal for lack of jurisdiction should be summarily reversed.

Respectfully submitted,

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